IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-748

FRANK IREY, JR., INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

McNEILL STOKES
Stokes & Shapiro
3920 First National Bank Tower
Atlanta, Georgia 30303

HERBERT J. MILLER, JR.
NATHAN LEWIN
MARTIN D. MINSKER
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037

OLIVER N. HORMELL
423 Third Street
California, Pennsylvania 15419

Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

FRANK IREY, JR., INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION, AND
JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Frank Irey, Jr., Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 24, 1975.

OPINION BELOW

The en banc opinion of the Court of Appeals, which has not yet been reported, appears as Appendix A

hereto.[1] The panel opinion of the Court of Appeals issued on November 4, 1974, which was affirmed upon rehearing by the Court sitting en banc, appears as Appendix B. The order and opinion of the Occupational Safety and Health Review Commission, reported at 4 OSAHRC 1 (1973), is reprinted as Appendix C, and the order and opinion of the Occupational Safety and Health Review Commission Administrative Law Judge, which is reported at 4 OSAHRC 8 (1973), is reprinted as Appendix D.

JURISDICTION

The judgment of the Court of Appeals upon rehearing was entered on July 24, 1975. A timely Application for An Extension of Time to File Petition For Writ of Certiorari was filed, and an Order was entered extending the time for filing to and including November 21, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

---

[1] Simultaneously herewith, a Petition for Certiorari is being filed in the case of *Atlas Roofing Company, Inc. v. OSHRC*, seeking review of a Fifth Circuit panel decision rejecting the same constitutional claims. *See Atlas Roofing Company, Inc. v. OSHRC, et al.*, ____ F.2d ____ (Dkt. No. 73-2249, September 8, 1975). Further, a simultaneous Petition for Certiorari is being filed in the case of *Dan J. Sheehan Company v. OSHRC, et al.*, seeking review of a Fifth Circuit panel decision rejecting a constitutional question raised, but not reached in either the *Irey* or *Atlas* decision, i.e., whether the OSHA enforcement scheme "chills" or "coerces" the employer's due process right to a hearing through the possibility of infliction of greater penalties. *See Dan J. Sheehan Company v. OSHRC, et al.*, ____ F.2d ____ (5th Cir., Dkt. No. 74-2764, October 8, 1975).

QUESTIONS PRESENTED

1. Whether the procedures set up by the Occupational Safety and Health Act of 1970 for administrative enforcement of the Act's civil penalties and administrative definition of the Act's proscriptions violate Article III and the Fifth and Sixth Amendments to the Constitution because the "civil penalties" and administrative enforcement mechanism are "penal" in nature and effect but omit the constitutional protections required in penal proceedings, including trial by jury.

2. Assuming *arguendo* that such civil penalties and enforcement procedures are civil in nature and effect, whether such procedures deny the defendant employer his right to jury trial guaranteed by the Seventh Amendment to the Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651 *et seq.* (1970), is reprinted in Appendix E.

The relevant provisions of the United States Constitution appear in Appendix F.

STATEMENT OF THE CASE

Petitioner is a general contractor whose construction site was inspected after a report to the Occupational

Safety and Health Review Commission that one of petitioner's employees had died on the site. The inspection took place on January 12 and 13, 1972, and on March 22, 1972, petitioner was served with citations for one "willful and serious" violation, one "serious" violation, and five non-serious violations.[2] The proposed administrative penalty assessed against petitioner for the willful and serious violation was a fine of $7,500 and a direction that it abate the condition "immediately".[3] Petitioner was also fined $800 for the "serious" violation and a total of $535 for the five non-serious violations. He was given a maximum of six days to abate all the conditions.

In order to prevent the citations from becoming final under Section 10 of the Act, petitioner Irey served a notice of contest within the time period allowed. The Secretary thereafter filed a Complaint with the Occupational Safety and Health Review Commission, and the petitioner Irey filed an Answer denying any violation of the Act.

---

[2]The Act provides that an employer who is cited for a "serious violation" *shall* be assessed a civil penalty of up to $1,000, and an employer whose violation is not "serious" *may* be assessed a similar civil penalty. Sections 17(b), (c). It defines "serious violation" as one presenting a substantial probability of death or serious physical harm. Section 17(k). A civil penalty of up to $10,000 is authorized for willful or repeated violations. Section 17(a). A criminal sanction of up to $10,000 fine and six months' imprisonment is authorized for any willful violation which causes the death of an employee. Section 17(e), (App. E, pp. 17-18).

[3]The penalty was subsequently reduced to $5,000.

A hearing was held on the Secretary's Complaint on June 27, 1972, before a hearing examiner of the Occupational Safety and Health Review Commission. At the hearing, petitioner moved to dismiss the Secretary's Complaint on grounds of the unconstitutionality of the enforcement procedures of the Act. On November 13, 1972, the administrative hearing examiner rendered a decision affirming certain violations, imposing a $5,000 penalty for the willful violation, and denying the motion to dismiss. The Commission directed review of the decision on December 14, 1972, requesting the parties to brief the issue of whether the penalty should be raised to $10,000, and rendered a decision on August 1, 1973, affirming the examiner's decision. (App. C).

Petitioner Irey, a resident of the territorial jurisdiction of the Third Circuit, filed a timely Petition for Review of the Review Commission's final order pursuant to 29 U.S.C. § 660(a) (1970), Section 11(a) of the Act.

The Court of Appeals, Circuit Judge Gibbons dissenting, held in its judgment and opinion issued on November 4, 1974, that the enforcement procedures of the Act did not contravene Article III or the Fifth, Sixth, or Seventh Amendments to the Constitution, but remanded the case to the Commission for a new determination as to whether the violation committed by Irey was willful, because the Commission had applied an erroneous definition of "willful" in its initial decision. (App. B).

Petitioner thereafter filed a timely Petition for Rehearing, which was granted by the Court of Appeals on December 20, 1974, and the case was set to be reargued before the Court of Appeals sitting en banc.

On July 24, 1975, after reargument and rebriefing, the Court of Appeals by a six-to-four vote, Circuit Judges Gibbons, Aldisert, Hunter, and Garth dissenting, issued its judgment and opinion determining that the judgment of the panel should stand, both as to the constitutionality of the Act and its enforcement procedures and the definition of willfulness. The majority held that the Court, in the case of *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), had ruled that the Seventh Amendment did not apply to proceedings involving a monetary judgment heard before an administrative agency, "and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage." (App. A, pp. 8).

REASONS FOR GRANTING THE WRIT

A. WHETHER JURY TRIALS ARE CONSTITUTIONALLY REQUIRED IN "CIVIL PENALTY" PROCEEDINGS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT IS A QUESTION OF SUBSTANTIAL NATIONAL IMPORTANCE WHICH IS BEING CONSIDERED BY NUMEROUS COURTS

Petitioner brings before this Court for the second time "the important question of the right to jury trial in an OSHA penalty proceeding" (en banc majority opinion, App. A, p. 1) established by Congress in what has been characterized as a "seemingly unique piece of legislation" (*Lance Roofing Company, Inc., et al., v. Hodgson*, 343 F.Supp. 685 (N.D. Ga.) *aff'd*, 409 U.S.

1070 (1972)) -- the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 *et seq.* (1970).[4]

In drafting OSHA, Congress devised a most unusual administrative enforcement procedure. Unlike civil penalty provisions common in other agency statutes, the OSHA procedure gave the agency the full power to adjudicate a violation and to assess a punitive monetary penalty. The adjudication and penalty were made subject only to very limited judicial review.

Under the more common statutory schemes, penalty actions for violation of an agency's regulations are brought in District Court, which gives the defendant a right to a jury trial, *see Hepner v. United States*, 213 U.S. 103 (1909); *United States v. J.B. Williams*, 498 F.2d 414 (2d Cir. 1974); or the money judgments are in effect ancillary to equitable relief granted by the administrative agency, *see N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937). The OSHA

---

[4] In the *Lance Roofing* case, and in an action in the District Court for the Southern District of West Virginia brought simultaneously by Irey, *Frank Irey, Jr., Inc. v. Hodgson*, 354 F.Supp. 20 (S.D. W.Va.), *aff'd*, 409 U.S. 1070 (1972), the Act was challenged in an action for declaratory judgment and injunctive relief. However, since both *Lance* and *Irey* plaintiffs had filed a Notice of Contest, thus invoking an administrative adjudicative process, the district court held in each case that the plaintiffs must exhaust their administrative remedies by presenting their constitutional objections in the administrative process and seeking judicial review of that process. This Court affirmed, with Mr. Justice Stewart indicating he would have noted probable jurisdiction. 409 U.S. 1070 (1972). Irey has so proceeded, and it now asks this Court to review the merits of its constitutional objections concerning a statute which is probably the most pervasive federal regulatory statute existent today, which statute has not given rise to any previous judgment or opinion of this Court.

procedure, however, subjects employers to punitive monetary penalties payable to an agency of the United States, without permitting them the protection of the Fifth and Sixth Amendment rights applicable to ordinary criminal proceedings, or even the Seventh Amendment right to jury trial applicable to an ordinary suit for the civil penalty. Congress has short-circuited these rights by simply placing the enforcement mechanism wholly within the administrative agency.

In the companion case of *Atlas Roofing Company, Inc. v. OSHRC, et al.*, ____ F.2d ____ (Dkt. No. 73-2249) (September 8, 1975), the Fifth Circuit recognized "the importance as well as the novelty in some cases of petitioner Atlas' agruments" (Slip opinion, p. 7647) and noted regarding the Sixth Amendment jury argument (Slip opinion, p. 7650, footnote omitted):

> This issue has importance even beyond the case at hand because the streamlined enforcement procedure embodied in OSHA, although presently prescribed in only a few instances, has been recommended as a blueprint for a major revision of the enforcement systems of all federal agencies.

The Fifth Circuit panel went on to state that "the enormous potential effects of a proliferation of OSHA-like enforcement systems are factors that persuade us that we should carefully scrutinize the statute against the case law experience." (Slip opinion, p. 7656).[5]

---

[5] The recommendation referred to by the Fifth Circuit (Slip opinion, p. 7650 n.11) is set forth in Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, REPORT TO THE

We demonstrate in the following sections of this petition and in the companion Petition for Certiorari in *Atlas Roofing Company, Inc. v. OSHRC*, that the decisions below present important questions of constitutional law respecting jury rights not previously decided by this Court. These issues – particularly in light of the lower court's treatment of the Seventh Amendment question – also pose vital concerns going to the allocation of power between the judicial and legislative branches of government under Article III of the Constitution. Finally, the questions are presented in a form incontestably ripe for resolution by this Court with no "factual" disputes likely to obscure the constitutional analysis necessary for their disposition.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1972), pp. 900-901.

Professor Goldschmid has complied a table of some 90 civil penalty provisions in the U.S. CODE. Of these, only four, including the OSHA penalty provisions, assigned to the agency the authority to impose a fine without *de novo* review in the courts.

Review of the statutes adopted since the date of Professor Goldschmid's compilation reveals at least one new instance of administrative imposition of monetary penalties without *de novo* judicial review. Section 25 of the Fair Labor Standards Act Amendments of 1974, PUB. L. 93-259, 88 STAT. 55 (1974), expands the powers given the Secretary of Labor by OSHA into the child labor area. The Act provides for an initial determination by the Secretary, which if uncontested within 15 days after receipt, becomes final, or, if contested, is finally determined by the Secretary after notice and hearing. 88 STAT. 55, § 25(c).

As an example of the effect of the future development of civil penalty schemes, OSHA alone has issued 155,827 citations with accompanying civil penalties of $20,173,820 for the four year period from its inception in April, 1971, through April, 1975. 5 OCCUPATIONAL SAFETY AND HEALTH REPORTER 155 (BNA July 3, 1975).

B. THE MAJORITY BELOW MISREAD AND MISAPPLIED THIS COURT'S SEVENTH AMENDMENT DECISIONS IN DENYING THE PETITIONER A JURY TRIAL

The en banc majority opinion, relying principally on *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), held the Seventh Amendment inapplicable to administrative proceedings (App. A, p. 4):

> [I]f the proceeding is before an administrative agency rather than in the courts, the Supreme Court has held that the Seventh Amendment does not apply.

The whole of the majority's analysis is set forth in the following passages (App. A, pp. 8-9, footnotes omitted):

> Nevertheless, it would seem that reliance upon the claimed equitable coloration of the Occupational Safety and Health Act obscures the simple fact that this is an administrative adjudication. The Supreme Court's rulings to date leave no doubt that the Seventh Amendment is not applicable, at least in the context of a case such as this one, and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage.
>
> The petitioner likens the assessment of these OSHA civil penalties to an *in personam* monetary judgment which can be obtained only in an action at law. But that similarity has not proved decisive to the Supreme Court. *Curtis v. Loether, supra*, at 196. We see no difference in the impact on an employer between an administrative award which requires him to pay a fixed sum of money to certain employees as in the Jones & Laughlin case and one which orders payment of a civil penalty to the United States.

> Our function is not to pass upon either the wisdom or desirability of such an administrative adjudicatory process. We are limited to deciding whether it is constitutional within the limitations set by the Supreme Court.
>
> There is a line beyond which Congress may not transfer traditional remedies from the courts to administrative agencies so as to evade the protection of the Seventh Amendment. As so often with constitutional adjudications, such a point need not be defined with precision to cover all cases for all time. We only decide the case before us, and, as the panel previously held, that line has not been crossed in this case.

As the four dissenting judges below pointed out, (App. A, pp. 12-14) this construction of *Jones & Laughlin* simply makes the Congress the final arbiter of the scope of the Seventh Amendment.

Judge Gibbons in dissent argued that the "line" foreseen by the majority must be discernible in order to be a viable ground of deciding such an important question of constitutional law. However, the only "line" advanced by the majority and the Respondent Review Commission, and discernible to Judge Gibbons, was "wherever Congress says it is." (App. A, p. 13).

In a civil action brought by the Government in the District Court for the collection of a statutory penalty, the defendant has the same Seventh Amendment jury right as would attach to a private civil action for a debt in excess of $20. *See United States v. Regan*, 232 U.S. 37, 49 (1914); *Hepner v. United States*, 213 U.S. 103, 115 (1909); *see generally United States v. J.B. Williams Company, Inc.*, 498 F.2d 414, 422-23 (2nd Cir. 1974); 5 MOORE, FEDERAL PRACTICE ¶38.31[1], at 232-33 (1971 ed.). If Congress may eliminate that

Seventh Amendment right simply by delegating the adjudicatory task to an administrative agency rather than an Article III Court, it may do so for all civil actions cognizable under Article III.[6] As Judge Gibbons reasoned, "if Congress can by fiat define the term 'administrative adjudication' and thereby necessarily define the Seventh Amendment term 'Suits at common law', what role do the Article III courts play? . . . But my point is that . . . the constitutional scheme of things requires that the Court, not Congress, give meaning to the constitutional terms, and thereby define the limits of administrative proceedings." (App. A, pp. 13-14).

Jones & Laughlin compels no such extraordinary result, particularly when read in light of this Court's recent cases upholding the right to a jury trial in a variety of circumstances. *See Curtis v. Loether*, 415 U.S. 189 (1974); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Ross v. Bernhard*, 396 U.S. 531 (1970). The *Jones & Laughlin* case sustains the power of the NLRB under the National Labor Relations Act to award back pay as incidential to the Board's other special remedial powers under the statute, powers which, like those of an equity court, were unknown in a suit at common law. *Cf. Curtis v. Loether, supra*, at 196-97; *Albermarle Paper Company v. Moody*, ____ U.S. ____, 43 U.S.L.W. 4880, 4891-92 (1975) (Rehnquist, J., concurring).

---

[6]On the majority's reading of *Jones & Laughlin*, there is no Seventh Amendment "line" – in the sense of a principled decision – to be drawn short of according conclusive effect to congressional choice of forums similar to the effect the majority opinion accords the congressional choice on the Sixth Amendment jury right. See text at p. 21 *infra*.

This is certainly all that Chief Justice Hughes intended in his opinion in *Jones & Laughlin*. Thus, in a two paragraph discussion of the Seventh Amendment issue, he first states, 301 U.S. at 48:

> The Amendment thus preserves the right which existed under the common law when the Amendment was adopted . . . Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law . . . .

The Chief Justice then twice points out, *id.*:

> It [the Seventh Amendment] does not apply where the proceeding is not *in the nature of a suit at common law*. *Guthrie National Bank v. Guthrie*, 173 U.S. 528, 537.
>
> The instant case is not a suit at common law *or in the nature of such a suit*. The proceeding is one unknown to the common law. It is a statutory proceeding . . . . (emphasis added)[7]

---

[7] Any doubt about the Chief Justice's meaning is cleared up by reading the case he cited to indicate his meaning: *i.e.*, *Guthrie National Bank v. Guthrie*, *supra*. The *Guthrie* case involved a challenge on, *inter alia*, Seventh Amendment grounds to a statute challenge on, *inter alia*, Seventh Amendment grounds to a statute of the territorial legislature of Oklahoma authorizing enforcement in the territorial district courts of certain claims against the municipality of Guthrie. The Court affirmed the constitutional power of the legislature to authorize suits of this nature, though they were clearly not cognizable at common law. *See* 173 U.S. at 535. *See also en banc* dissent discussing *Glidden v. Zdanok*, 370 U.S. 530 (1962) (App. A, p. 13 n.4). In that context, at page 537 of the *Guthrie* opinion (cited by Chief Justice Hughes in *Jones & Laughlin*), the Court disposed of the Seventh Amendment argument in language strikingly parallel to that employed by the Chief Justice:

> There is no force to the objection that in ascertaining the facts provision must be made for a trial by jury, if

In light of this court's recent decision in *Curtis v. Loether, supra,* a congressional statute authorizing an employee fired for his union activities to sue in district court solely for damages limited to loss of wages would carry a Seventh Amendment jury right. A civil penalty statute authorizing the government to institute such a suit with the penalty to be measured by some multiple of wages lost would carry a Seventh Amendment jury right for the employer. Could Congress in such a cas simply obviate the Seventh Amendment by substituting an Administrative Law Judge for a United States District Judge?[8]

The majority of the Third Circuit, sitting en banc, ignored the established definitions of "suits at common law", which this Court has applied in cases decided a century-and-a-half ago and reaffirmed as recently as

---

demanded, or else that the Seventh Amendment to the Constitution of the United States is violated, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

This Act does not infringe upon that Amendment. The proceeding under it is not in the nature of a suit at common law, and the cases already cited show the power of the legislature to provide for payment by taxation of claims of the nature of these involved herein.

See also Bank of Hamilton v. Dudley's Lessee, 27 U.S. [2 Pet.] 492, 525-26 (1829) (Marshall, C.J.), distinguished in *Guthrie, supra,* 173 U.S. at 537-38; *compare Block v. Hirsh,* 256 U.S. 135, 138 (1921) (Holmes, J.), discussed at n.9, *infra.*

[8]Similarly, could *Curtis v. Loether, supra,* be legislatively reversed simply by placing the cause of action under Title VIII of the Civil Rights of 1968, 82 Stat. 88, 42 U.S.C. § 3612, under the jurisdiction of an Administrative Law Judge?

1974, in *Pernell v. Southall Realty*, 416 U.S. 363. Quoting from *Parsons v. Bedford*, 3 Pet. [28 U.S.] 433, 447 (1830), the Court said in *Pernell*, 416 U.S. at 374-375, that the phrase includes not only suits

> which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.

And in *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891), also quoted with approval in *Pernell v. Southall Realty*, *supra*, 416 U.S. at 370, this Court offered the following definition of an action at law (emphasis added):

> It would be difficult, and perhaps impossible to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law . . . ; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, *or for the recovery of a money judgment*, the action is one at law.

By reaffirming in *Pernell* these well-accepted definitions of the constitutional term "suits at common law," this Court was marking off a clear and precise line which could be followed, in future legislation and litigation, by Congress and the lower courts. Under the definition, the proceeding which this case concerns – seeking exclusively the collection of a monetary penalty – qualifies for the constitutional protection. The

decision below necessarily blurs and confuses the law regarding the Seventh Amendment and jeopardizes this Court's rulings sustaining the constitutional right.[9]

Judge Gibbons correctly observed in his dissent to the original panel decision that (App. B, p. 24):

> . . . no case in the Supreme Court has ever sustained the imposition of an in personam judgment for a civil penalty in a proceeding in which the defendant claimed and was denied the right of a jury trial guaranteed by the seventh amendment.[10]

If, as stated by Judge Gibbons in his dissent, the majority in the court below is correct in reading the *Jones & Laughlin* case to totally exempt administrative adjudications from the mandate of the Seventh Amendment, and Congress need only exercise its

---

[9]The offhand reference in *Pernell* to the possibility that Congress might "entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency" (416 U.S. at 383) – on which the majority below placed heavy reliance – is an unsound basis for rejection of petitioner's right to a jury trial. The statement appeared in the Court's opinion as an *arguendo* assumption – hardly a deliberate holding on an important constitutional question. Moreover, the "assumption" rested on a factual premise (bolstered by the citation of *Block v. Hirsh*, 256 U.S. 135 (1921)) that the landlord-tenant relationship involved many remedies foreign to "suits at common law" within the meaning of the Seventh Amendment. In such circumstances, *Jones & Laughlin* would plainly apply.

[10]See the discussion of *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909), and *Helvering v. Mitchell*, 303 U.S. 391 (1938), in Judge Gibbon's dissent from the panel's decision (App. B, pp. 18-19, 21-23).

legislative choice to commit a remedy to an administrative agency to invoke this exemption, "then unbeknownst to the work of legal scholarship, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), affected the most profound and enormous redistribution of power among the three branches of the federal government of any case in the Court's history." (App. A, p. 13).

Irey contends that *Jones & Laughlin* did not affect such a profound result and that the reading of that decision by the court below creates a square conflict in principle between the decision below and *Jones & Laughlin* and each subsequent case in this Court following *Jones & Laughlin*. Moreover, Irey contends that the court below misread and distorted the holdings of this Court in the recent cases of *Curtis v. Loether*, *supra*, and *Pernell v. Southall Realty*, *supra*. Irey respectfully urges this Court to grant certiorari in order to correct the misreading of the *Jones & Laughlin*, *Curtis*, and *Pernell* cases by the court below and to settle the grave constitutional issues decided by the court below on its erroneous reading of *Jones & Laughlin*, *Curtis*, and *Pernell*.

C. THE MAJORITY BELOW MISREAD AND MISAPPLIED THIS COURT'S SIXTH AMENDMENT DECISIONS IN DENYING PETITIONER A JURY TRIAL

Section 17 of OSHA, 29 U.S.C. § 666 (App. E, pp. 17-18), provides both civil and criminal penalties for violations of the Act and the regulations promulgated by the Secretary of Labor. The Act in turn requires the

employer to furnish a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees", 29 U.S.C. § 654(a)(1), and in compliance with the regulations promulgated by the Secretary. 29 U.S.C. § 654(a)(2) (App. E, p. 4). If the employer willfully violates this requirement and a death results from the violation, the employer can be criminally prosecuted. If convicted, he can be sentenced up to six months in jail or a $10,000 fine, or both. 29 U.S.C. § 666(e). The proof required in this criminal action is very similar to that required in an ordinary common law involuntary manslaughter case: the government must show that death resulted from conduct falling below prescribed standards of conduct. *See* PERKINS, CRIMINAL LAW 70-73 (2d ed. 1969). Indeed, because § 666(e) requires that the violation be "willful", the requisite *mens rea* approaches the unreasonable risk-taking traditionally held sufficient to satisfy the malice aforethought requirement of common law murder.

While there is little doubt that Congress was well within constitutional bounds in enacting this limited federal homicide statute, it did not stop with the criminal penalty. Instead, Congress at the same time created a parallel "civil" sanction for the same conduct: the willful creation of a hazard "likely to cause death or serious physical harm." 29 U.S.C. § § 654, 666(a). Under this nominally civil provision, "any employer who willfully or repeatedly violates the Act or the regulations may be assessed a civil penalty of up to $10,000 for each violation." Since in this case a death did result from the alleged violation, the Secretary had the choice of proceeding against petitioner in either a criminal or administrative action.

The proof required in the administrative hearing was similar to that which would have been introduced in the criminal action, and since the prospective defendant was a corporation, the maximum penalty under either statutory proceeding was the same: a $10,000 fine. The primary differences between the two proceedings would be that the case against the petitioner would be heard by a hearing examiner rather than a jury; the standard of proof would be the "preponderance" standard rather than the "reasonable doubt" standard; the rules of evidence would be those applicable to an administrative proceeding rather than a criminal trial; and petitioner would not be given protection against being placed twice in jeopardy by a subsequent action for the same alleged violation. In other words, the "civil, administrative" proceeding was identical to a criminal trial except that it denied petitioner all the constitutional rights enjoyed by a criminal defendant under the Fifth and Sixth Amendments and the Rules of Criminal Procedure.

Not surprisingly, the Secretary elected to proceed by the administrative route. In addition to alleging a willful violation of the Act, the Secretary charged petitioner with five non-serious violations and one "serious" violation, defined in the statute as a violation "creating a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(j). The Secretary sought penalties totaling $8,835, almost as much as the maximum fine prescribed in the parallel criminal provision. When the hearing examiner found against petitioner and petitioner indicated its intention to seek review in the OSHRC, the Commission informed petitioner that upon review, it would consider raising the fine for the willful violation from the $5,000

assessed by the hearing examiner to $10,000. This threat of an increased penalty upon appeal would, of course, be impermissible if the proceeding were denominated criminal. *See North Carolina v. Pearce*, 395 U.S. 711 (1969).

As a result of this administrative proceeding, petitioner in effect stands adjudged guilty of a form of homicide resulting from a willful violaton of its duty to avoid creating risks of death and serious harm to its employees. Yet, because Congress has chosen to permit the Secretary to proceed administratively rather than criminally, petitioner was denied the entire range of rights that are normally available to protect against error in so serious an expression of social condemnation.

In the seminal case of *Boyd v. United States*, 116 U.S. 616, 633-35 (1886), the Court held that a statutory forfeiture proceeding, although nominally civil, was in fact criminal in nature and that Fourth and Fifth Amendment protections attached to the same extent as in any other criminal prosecution. The Court wrote:

> If the government prosecutor elects to waive an indictment and to file a civil information against the claimants (that is, civil in form) can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. *Id.* at 634.

See also One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 695 (1965); *United States v. U.S. Coin & Currency*, 401 U.S. 715, 718 (1971).

The Third Circuit panel below recognized that "there is force and logic to [petitioner's] arguments," and insisted that "we do not dismiss them lightly." The panel majority also stated that "[i]n the case *sub judice*, candor compels us to concede that the punitive aspects of the OSHA penalties, particularly for a 'willful' violation, are far more apparent than any 'remedial' features" (App. B, p. 7). But even after conceding the punitive aspects of OSHA, the panel majority failed to apply the mandate in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), that regardless of its label, if a statute is penal in nature, then citizens must be afforded Fifth and Sixth Amendment procedural safeguards.

In the companion case of *Atlas Roofing Company v. OSHRC*, the Fifth Circuit explicitly declined to accord Congress' label a conclusive effect and instead performed the *Mendoza-Martinez* analysis the Third Circuit avoided in this case.[11] While rejecting Petitioner Atlas' Sixth Amendment claims in the context of charges of "serious violations" in that case, the Fifth Circuit expressly reserved the question whether a "willful" violation could be the subject of a non-jury "civil enforcement" proceeding. (Slip opinion, p. 7658, n.39). That issue is squarely presented on the record in this case.[12]

---

[11]We discuss the *Mendoza-Martinez* analysis in the companion Petition for Certiorari in the *Atlas* case.

[12]The criminal character of the civil penalty for willful violations is apparent from the comments of Senator Williams, an author of the Act, who remarked during debate that "we are not, *except in the case of willful disobedience of the Act*, dealing with criminals and criminal laws." 116 CONG. REC. 37342 (1970) (emphasis added).

CONCLUSION

The issues posed in this case and the companion case of *Atlas Roofing Company v. OSHRC* are as fundamental as they are controversial;[13] they are also an outgrowth of decisions of this Court such as *N.L.R.B. v. Jones & Laughlin, supra*, decided in the context of very different statutory schemes, but which the lower courts here, with considerable doubt, felt bound to follow in the context of OSHA. The Third Circuit panel particularly expressed doubt about the wisdom and necessity of pursuing laudable social goals through the device of compulsory administrative adjudication of rights traditionally submitted to a jury of one's peers: (App. B, p. 9 n.11):

> We perceive no overriding consideration which favors the congressional policy of recent years to insulate administrative adjudication from the open and searching examination that full judicial review provides. The necessity for an administrative agency on occasion to submit its determination to the scrutiny of a jury of citizens would be a healthful and disciplinary process.

We submit that the issues are uniquely ripe for this Court's resolution and, before the unusual model of

---

[13]Additional academic commentaries on these issues include McClintock & Bohrnsen, *Constitutional Challenges*, 9 GONZAGA L. REV. 361 (1973); Note, OSHA: EMPLOYER BEWARE, 10 HOUSTON L. REV. 426 (1973); Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974); Hay, *OSHA Penalties – Some Constitutional Considerations*, 10 IDAHO L. REV. 223 (1974).

OSHA becomes the rule for the future, an authoritative determination by this Court of those issues is called for.

McNEILL STOKES
Stokes & Shapiro
3920 First National Bank Tower
Atlanta, Georgia 30303

HERBERT J. MILLER, JR.
NATHAN LEWIN
MARTIN D. MINSKER
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037

OLIVER N. HORMELL
423 Third Street
California, Pennsylvania 15419

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1765

FRANK IREY, JR., INC., a corporation,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, UNITED STATES DEPARTMENT OF LABOR and PETER J. BRENNAN, Secretary of Labor,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Argued June 13, 1974
Before: STALEY, GIBBONS and WEIS, *Circuit Judges*

Reargued May 8, 1975
Before: SEITZ, *Chief Judge*, STALEY, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

Oliver N. Hormell, Esquire
423 Third Street
California, Pa. 15419

McNeill Stokes, Esquire
Attorneys for Petitioner

Of Counsel:

William J. Kilberg, Esquire
Solicitor of Labor

Benjamin W. Mintz, Esquire
Associate Solicitor for Occupational Safety and Health

Michael H. Levin, Esquire
Counsel for Appellate Litigation

Ann Mason Noble, Esquire

Irving Jaffe, Esquire
Acting Asst. Attorney General

Stephen F. Eilperin, Esquire
Michael H. Stein, Esquire
Department of Justice
Washington, D.C.

Neil H. Koslowe, Esquire
Attorneys for Respondents

OPINION OF THE COURT

(Filed July 24, 1975)

WEIS, *Circuit Judge.*

We revisit the important question of the right to a jury trial in an OSHA penalty proceeding. A majority of the panel which originally heard this case decided that the administrative proceedings did not run afoul of the Seventh Amendment. — F.2d — (3d Cir., No. 73-1765, Nov. 4, 1974). After further briefing and argument before the court *in banc*, we have concluded that the judgment of the panel should stand.

The factual background of the case is set out in the prior opinion, and we need not repeat it here. The employer-petitioner contends that the assessment of a civil penalty by the Occupational Safety and Health Review Commission was, for all intents and purposes, the same as an *in personam* monetary judgment. It argues that such a proceeding, being in the nature of debt, presents an issue which historically was tried at common law and, therefore, a jury trial should be available even though the government is the plaintiff. *Hepner v. United States*, 213 U.S. 103 (1909).

The requirement of a jury verdict could be met in a *de novo* trial in the district court on appeal from an administrative agency. However, the Occupational Safety and Health Act permits only limited judicial review of the administrative agency's factual findings under the "substantial evidence" test. It is that narrow scope of review which, according to petitioner, abrogated its Seventh Amendment right to a trial by jury, both as to the fact of violation and the amount of penalty.[1]

---

1. That substantial amounts may be involved is demonstrated by Beall Construction Co. v. Occupational Safety & H. Rev. Com'n, 507 F.2d 1041 (8th Cir. 1974). There, OSHA had proposed penalties totalling $35,442 for alleged safety violations at a construction site. Through administrative proceedings before an administrative law judge and the Commission, the penalties were reduced to $620. The large penalties initially proposed understandably alarm employers in similar circumstances. On the other hand, the final outcome may be cited by those who maintain that the administrative remedies do serve to prevent some injustices.

The Secretary asserts that OSHA proceedings are essentially equitable and for that reason the Amendment does not apply. He contends that the enforcement procedures are designed to insure compliance with safety standards and that the purpose of civil penalties is to prevent recurrences of violations.

Since the scope of review is important to the resolution of this appeal, a survey of the Act's provisions on judicial review is appropriate. A person against whom a penalty has been imposed may obtain a review of the order in the appropriate United States court of appeals. That court is authorized "to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. • • • The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." If further evidence is required, the court can order it to be taken before the Commission. 29 U.S.C. § 660(a).

The Secretary also has the right to petition the court for review. Alternatively, an OSHA order which has not been appealed by the employer may be filed by the Secretary with the clerk of the court of appeals, who will then enter a decree enforcing the order unless otherwise directed by the court. 29 U.S.C. § 660(b). The court of appeals may assess the civil penalties of 29 U.S.C. § 666(a)-(d) as well as any other available remedies in a contempt proceeding brought to enforce its decree. When, apparently, neither party has invoked the review jurisdiction of the court of appeals, civil penalties may be recovered in a civil action in the United States district court.[2] 29 U.S.C. § 666(k).

---

2. An employer who sought to litigate the fact of violation at that stage would be confronted with his failure to utilize the judicial review provided by the statute. United States v. Sykes, 310 F.2d 417 (5th Cir. 1962); Weir v. United States, 310 F.2d 149 (8th Cir. 1962). 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 23.07 (1958).

In summary, while court review of the fact of violation and amount of penalty is limited by the substantial-evidence standard, the agency may compel payment only by resort to the judicial system. The Act does not totally exclude the judicial branch of government from overseeing and enforcing the statutory provisions. *See National Labor Relations Board v. Kingston Cake Co.*, 206 F.2d 604, 611 (3d Cir. 1953). *See also* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 264 (1965).

The application of the Seventh Amendment to judicial proceedings traditionally depended on whether the suit was legal or equitable in nature. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830). If a statute creates a new remedy which is to be processed in the courts, that distinction is pertinent and may determine whether a jury trial is required. *Curtis v. Loether*, 415 U.S. 189 (1974).[3]

But, if the proceeding is before an administrative agency rather than in the courts, the Supreme Court has held that the Seventh Amendment does not apply. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), an administrative award of back pay was challenged as violative of the Constitution. The Court said:

> "It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. [Citations] Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have

3. The issue to be submitted to the factfinder is the relevant focus of an inquiry rather than the general nature of the proceeding. After the issue has been defined, its historical setting is then determined to see whether it would have been tried "at common law" in contradistinction to equity. 9 Wright & Miller, Federal Practice and Procedure: Civil § 2302 (1971).

been recovered in an action at law. [Citations] It does not apply where the proceeding is not in the nature of a suit at common law. [Citation]

"The instant case is not a suit at common law or in the nature of such a suit. The *proceeding* is one unknown to the common law. It is a statutory *proceeding*. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit." 301 U.S. at 48-49. (Emphasis added).[4]

The Court reiterated its position in *Curtis v. Loether*, *supra*, stating:

"*Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme . . . These cases uphold congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment." 415 U.S. at 194-95 (footnote omitted).

The same theme was repeated a few months later in *Pernell v. Southall Realty*, 416 U.S. 363 (1974), in the con-

4. It has been suggested that some administrative remedies have been held outside the Amendment's ambit because of "a strangeness to the common law" rather than "a correspondence to equity." Note, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 Nw. U. L. Rev. 503, 527 (1973). *See also*, Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1267 (1971), where the author makes the distinction between a statutory proceeding and a statutory cause of action. For the view approving assessment of civil penalties, *see* Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, 2 Recommendations and Reports of the Administrative Conference of the United States (1972).

text of a statute governing landlord-tenant disputes. While holding that a jury trial was required because of the underlying legal nature of the suit in the District of Columbia courts, Mr. Justice Marshall wrote:

> "We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency." 416 U.S. at 383.

This statement was based on the case of *Block v. Hirsh*, 256 U.S. 135 (1921).[5]

A fair reading of the Supreme Court's decisions on the application of the Seventh Amendment establishes three categories of litigation:

1. Legal proceedings in the courts;

2. Equitable and admiralty cases in the courts; and

3. Administrative adjudications.[6]

In only the first classification is the jury mandated.

---

5. In *Block v. Hirsh*, the Court sustained the operation of a rent control commission established to cope with critical housing conditions in the District of Columbia caused by World War I. Mr. Justice Holmes wrote:

> "While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word. A part of the exigency is to secure a speedy and summary administration of the law, and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent." 256 U.S. at 158 (four justices dissenting).

The *Pernell* Court characterized the case in almost the exact language it had used to describe the *Jones & Laughlin* case in *Curtis v. Loether*:

> "*Block v. Hirsh* merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." 416 U.S. at 383.

6. While the Supreme Court opinion in NLRB v. Jones & Laughlin, *supra*, uses the words "statutory proceedings" and in Curtis v. Loether, *supra*, "administrative proceedings," a more precise term is "administrative adjudications." Obviously, such functions as rule making may be included within the scope of a "proceeding" but are not pertinent here.

It is curious that while the Court was granting such a broad exemption for administrative adjudications, it was enlarging the area of court cases where the jury would be available. It did so in a trilogy of cases beginning with *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), where the Court reevaluated the scope of equitable jurisdiction in view of the expansion of legal rights provided by the Federal Rules of Civil Procedure.

Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), held that a jury trial on legal damage issues could not be withheld because the suit also included equitable claims which under past practice would have been adjudicated on the theory of "incidental jurisdiction" or the "cleanup" doctrine. *Ross v. Bernhard*, 396 U.S. 531 (1970), allowed a jury trial in a stockholder's derivative suit. The *Ross* Court again pointed out that the Federal Rules of Civil Procedure had eliminated the procedural distinctions between law and equity suits and that the value of the historical test based on these differences had been lessened. The Court noted that the legal nature of an issue is determined by considering (1) pre-merger custom with respect to such questions, (2) the remedy sought, and (3) the practical abilities and limitations of juries.[7] *Id.*, at 538 n.10. The dissent in *Ross v. Bernhard* characterized the decision perhaps accurately:

> "as a reflection of an unarticulated but apparently overpowering bias in favor of jury trials in civil actions." 396 U.S. at 551.

Falling chronologically between *Dairy Queen* and *Ross* was *Katchen v. Landy*, 382 U.S. 323 (1966), where a jury

---

7. For an article suggesting that Congress is better suited to determine the adequacy or inadequacy of a jury trial in a statutorily created cause of action, *see* Note, *Congressional Provision for Nonjury Trial under the Seventh Amendment*, 83 YALE L.J. 401, 415 (1973). *Cf.* Note, *Application of Constitutional Guarantees of Jury Trial to the Administrative Process*, 56 HARV. L. REV. 282 (1942). "The approach must be to discard the jury only where necessary, not whenever convenient . . ." *Id.*, at 294 (footnote omitted).

trial in a bankruptcy proceeding was denied. The Court held that a summary procedure to order the surrender of a voidable preference was not within the ambit of the Seventh Amendment. The opinion pointed out that the statute created bankruptcy tribunals as courts of equity which "deal in a summary way with 'matters of an administrative character . . .'" *Id.*, at 327. Thus, *Katchen* is consistent with the treatment accorded administrative determinations[8] in *NLRB v. Jones & Laughlin Steel Corp.*, *supra*, and furnishes some support for the Secretary's efforts to drape the cloak of equity over OSHA's shoulders.

Nevertheless, it would seem that reliance upon the claimed equitable coloration of the Occupational Safety and Health Act obscures the simple fact that this is an administrative adjudication. The Supreme Court's rulings to date leave no doubt that the Seventh Amendment is not applicable, at least in the context of a case such as this one, and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage.

The petitioner likens the assessment of these OSHA civil penalties to an *in personam* monetary judgment which can be obtained only in an action at law. But that similarity has not proved decisive to the Supreme Court. *Curtis v. Loether*, *supra* at 196. We see no difference in the impact on an employer between an administrative award which requires him to pay a fixed sum of money to certain employees as in the *Jones & Laughlin* case and one which orders payment of a civil penalty to the United States.

Our function is not to pass upon either the wisdom or desirability of such an administrative adjudicatory

---

8. While recognizing that bankruptcy courts would be traditionally viewed as courts of equity where the right to a jury trial would not attach, the *Katchen* Court went further in saying, "[m]oreover, this Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period,' . . . and that provision for summary disposition, 'without regard to usual modes of trial attended by some necessary delay,' is one of the means chosen by Congress to effectuate that purpose . . ." *Id.*, at 328-29 (citations omitted).

process. We are limited to deciding whether it is constitutional within the limitations set by the Supreme Court.[9]

There is a line beyond which Congress may not transfer traditional remedies from the courts to administrative agencies so as to evade the protection of the Seventh Amendment.[10] As so often with constitutional adjudications, such a point need not be defined with precision to cover all cases for all time. We only decide the case before us, and, as the panel previously held, that line has not been crossed in this case. For the reasons stated in the panel opinion of November 4, 1974, the Commission's decision finding a willful violation of 29 C.F.R. § 1926.652(b) is vacated and remanded for further consideration not inconsistent with this opinion and the order assessing penalties for violations of §§ 1926.652(h), 1926.401(f), 1926.150(c)(1)(viii), 1926.350(a)(1), 1926.51(c), and 1926.51(a)(1) will be affirmed.

GIBBONS, *Circuit Judge*, dissenting, with whom Judges Aldisert and Hunter join.

I do not intend to repeat here the argument set forth in my dissent from the original panel decision in this case. Nothing advanced during its en banc consideration has moved me from the belief that the Supreme Court has yet to reach the seventh amendment issues as presented in the context of penalty proceedings under the Occupational Safety and Health Act. In essence, the en banc majority takes issue with my treatment of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Today, I will direct my dis-

---

9. We do not blindly accept a Congressional label as the dissent suggests but rather we defer to the Supreme Court's determination that the Seventh Amendment does not apply to this type of case. While the dissent differs with our reading of NLRB v. Jones & Laughlin, *supra*, we believe that the more recent cases of Curtis v. Loether, *supra*, and Pernell v. Southall Realty, *supra*, allow no other interpretation than the one we reached.

10. *See* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 87-94 (1965); 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 2.12 (1958).

cussion to the majority's consideration of the seventh amendment issue in light of that decision.

The majority reasons that while the Supreme Court has recognized three broad generic categories of litigation:

1. legal proceedings in courts;

2. equitable and admiralty cases in courts; and

3. administrative adjudications;

the Court has found a mandate for a jury trial only in the first classification.

The classification serves to define the issue. It recognizes, and I acknowledge, that if a case is one which in 1791 would have been within the jurisdiction of equity or admiralty it does not implicate the seventh amendment. But it seems clear that the seventh amendment was intended to prevent both federal equity and federal admiralty from swallowing up the jurisdiction of courts of law which afforded jury trials. It was over that very issue that the long battle concerning the extension of admiralty jurisdiction to inland waters was fought,[1] and out of which the "saving to suitors clause" evolved even before adoption of the seventh amendment.[2] Neither the equity jurisdiction

---

1. C. Swisher, The Taney Period 1836-64, at 423-47 (1974) (Volume V of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States).

2. The "saving to suitors" clause was enacted as part of § 9 of the Judiciary Act of 1789 in which Congress vested the district courts with the admiralty jurisdiction authorized by Article III, § 2 of the Constitution. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76-77. It provided in pertinent part:

> "[T]he district court . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ."

This provision, in somewhat altered form, is now codified in 28 U.S.C. § 1333(1). Its effect is to permit a suitor

> "who holds an *in personam* claim, which might be enforced by suit *in personam* in admiralty, [to] also bring suit, at his election, in the 'common law' court—that is, by ordinary civil action in state court, or in federal court without reference to 'admiralty', given diversity of citizenship and the requisite jurisdictional amount." G. Gilmore & C. Black, The Law of Admiralty § 1-13, at 37 (2d ed. 1975).

Neither the majority nor the government rely upon *Crowell v. Benson*, 285 U.S. 22 (1932) which upheld the validity of an award made pursuant to

nor the admiralty jurisdiction are relied upon by the majority as a justification, in this case, for authorizing the imposition of an *in personam* money judgment without a jury trial.

Our difference then, is solely over the third category, those involving "administrative adjudication." At the outset it is well to recall that the term appears nowhere in the Constitution. In particular, it appears nowhere in Article III, § 2 which defines the categories of cases to which, and parties upon whom, the judicial power of the United States may be brought to bear. Only two of the clauses in Article III, § 2 are relevant to this case:

(1) "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . ., and

(2) "—to Controversies to which the United States shall be a Party . . . ."

It might be argued that since the seventh amendment by its terms, applies only to suits at common law, the amendment limits only the first clause of Article III, § 2; that is, that it refers only to federal question cases in law. It might be further argued that the broader language "Controversies to which the United States shall be a Party", since it does not repeat the "Law and Equity" language of the first clause, is not modified by the seventh amendment. Under that interpretation, in any suit to which the United States was a party, including a suit to collect money, a jury trial would be a matter of legislative grace. But that interpretation clearly proves too much, since the grant of diversity jurisdiction in Article III, § 2 is also "to Controversies" rather than to "Cases, in Law and Equity." Yet,

---

2. (Cont'd.)
the Longshoreman's and Harbor Workers' Compensation Act. 33 U.S.C. § 901 *et seq.* The Act referred the adjudicative process to an administrative agency, and enforcement of the agency award to the district court. The Supreme Court upheld the procedure, finding no violation of Article III by virtue of Congress' authorizing adjudication by an administrative agency in the first instance rather than by a constitutional court.

no one has ever suggested that the seventh amendment is inapplicable to diversity cases. Thus, I assume, as does the common consensus, that the seventh amendment applys to the entire judicial power of the United States to the extent that the exercise of that power involves suits at common law. I also assume, and I do not suppose the majority disagrees, that the seventh amendment binds the entire federal government, not merely the Article III courts. I also assume that Congress could not confer the entire diversity jurisdiction, including suits at common law, upon a non-Article III tribunal sitting without a jury. Nor, I suppose, would the case be different if Congress called those non-Article III adjudicators "administrators" rather than "judges."[3]

But if the majority is right about this case, then my last two assumptions are dead wrong, for nothing in the majority opinion gives any definition to the term "administrative adjudications" other than to simply recognize the label which Congress has fastened upon it. Indeed, that is precisely the government's position. When at oral argument the attorney appearing for the government was asked to suggest a standard by which an "administrative proceeding" falling outside the reach of the seventh amendment could be identified, the only standard he could suggest was the label Congress attached. The majority opinion although it gives passing lip service to the principle of judicial review, embraces this position by totally omitting any attempt to give content either to the seventh amendment term "Suits at common law" or to its term "administrative adjudication." The extent of its analysis is in three sentences:

> "There is a line beyond which Congress may not transfer remedies from the courts to administrative agencies so as to evade the protection of the Seventh Amend-

---

3 *See generally* H. Hart & H. Wechsler, The Federal Courts and the Federal System 390-401 (2d ed. 1973). Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953).

ment. As so often with constitutional adjudications, such a point need not be defined with precision to cover all cases for all time. We only decide the case before us, and, as the panel previously held, that line has not been crossed in this case."

(Majority opinion at 10) (footnote omitted).

But how do we know the line has not been crossed if we are not told where it is? What neutral principle was brought to bear in deciding that this case fell on the permissible side of the invisible line?[4] There is only one discernible to me in the majority's opinion—that urged by the government. The line is wherever Congress says it is.

If this is the teaching of the one authority upon which the majority relies, then unbeknownst to the world of legal scholarship, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), affected the most profound and enormous redistribution of power among the three branches of the federal government of any case in the Court's history. I had thought until today that the Court, not Congress, was the final arbiter of the lines drawn in the Constitution. But if

---

4. In analyzing the import of *Glidden v. Zdanok*, 370 U.S. 530 (1962), in which the Supreme Court held the Court of Customs and Patent Appeals and the Court of Claims to be Article III courts, the authors of a leading text pose the following questions:

"Justice Harlan is clearly correct, is he not, when he states that the reason there is no right to trial by jury in the Court of Claims is not because the Court of Claims is not a 'constitutional' court, but because suits against the United States—whether in the Court of Claims or in a district court—are not suits 'at common law' within the meaning of the Seventh Amendment?

But what if a non-Article III court were to be given jurisdiction in a case that *is* a suit at common law within the meaning of the Seventh Amendment? Can it be argued that the very fact that the delegation is to a non-Article III court makes the Seventh Amendment inapposite (or perhaps that the factors justifying delegation to such a tribunal also affect the application of the Seventh Amendment)? If so, is this an argument in favor of or against Congressional power to make such a delegation?"

H. Hart & H. Wechsler, *supra*, note 5, at 399-400 (emphasis in original). See the discussion of *Crowell v. Benson*, *supra*, in connection with the limitations on the jurisdiction of Article III court enforcement of administrative penalties in Professor Hart's celebrated "Dialogue." Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1374-79 (1953). Such refined analysis as is presented in these materials ought to suggest to the majority, the necessity for closer scrutiny of Congressional "labeling."

Congress can by fiat define the term "administrative adjudication" and thereby necessarily define the seventh amendment term "Suits at common law", what role do the Article III courts play? I have already referred to the possibility of administrative diversity cases. Can Congress, acting under its commerce clause powers refer all contract cases affecting interstate commerce to an "administrative" non-jury adjudicator? And in a sixth amendment context, can Congress "decriminalize" a whole range of conduct and refer enforcement of federal policies to an administrative civil commitment agency? Think of the judicial resources that would have been saved had that approach been taken during the Vietnam War with respect to the Selective Service Act. It is true, of course, that in either a sixth or a seventh amendment context, the elimination of a jury trial would still leave operable the due process protection of the fifth amendment. Thus some form of judicial review would remain.[5] But my point is that whether we are dealing with the sixth amendment guaranty of a jury trial "in all criminal prosecutions," or with the seventh amendment guaranty of a jury trial "[i]n Suits at common law," the constitutional scheme of things requires that the Court, not Congress, give meaning to the constitutional terms, and thereby define the limits of administrative proceedings.[6]

I suggest, moreover, that the Court has already done so with respect to the seventh amendment. In *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974), Justice Marshall, upholding the right to a jury trial in an action for possession of land, quoted with approval the definition of actions at law in *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891):

> "[it] would be difficult, and perhaps impossible, to state any general rule which would determine, in all

---

5 *See generally* H. Hart & H. Wechsler, The Federal Courts and the Federal System 396-97 (2d ed. 1973).

6. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); United States v. Nixon, 418 U.S. 683, 703-05 (1974) ("We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' ").

> cases, what should be deemed a suit in equity as distinguished from an action at law . . . ; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, *or for the recovery of a money judgment*, the action is 'one at law.' " (emphasis supplied).

The so-called "administrative adjudication" in this case never had any object other than the recovery of a money judgment, yet the majority simply accedes to the Congressional determination that it is not an action at law.

I stated earlier that *NLRB v. Jones & Laughlin Steel Corp., supra*, was the one authority upon which the majority relies. It is true that neither *Curtis v. Loether*, 415 U.S. 189 (1974) nor *Pernell v. Southall Realty, supra*, to which the majority refers, actually support the conclusion that the Court, not Congress, must determine the contents of the constitutional term "Suits at common law." Both upheld demands for jury trial, the first in a suit for damages for violation of Title VIII of the Civil Rights Act of 1968, and the second in a suit for possession of land pursuant to the summary dispossess statute of the District of Columbia. In each case the Court distinguished *Jones & Laughlin* which was raised as a bar to jury trial, as an administrative proceeding. But neither case can be read for the proposition that by calling something an "administrative adjudication" Congress can decide to handle "Suits at common law" without jury trials. No more could have been intended by these distinguishing references to *Jones & Laughlin* than to decide the Court's approval of congressional delegation of Article I power to an administrative agency in cases in which that procedure is constitutionally permissible. As I said in dissenting from the panel decision, there is no constitutional prohibition against referring matters of an equitable nature to an administrative fact-finding tribunal, and back pay incidental to injunctive relief is a traditional equitable remedy. The approving citation of *Whitehead v. Shattuck* in *Pernell v. Southall*

Realty, quoted earlier, should dispel any notion that the Court reads *Jones & Laughlin*, as a major surrender of the power of judicial review.[7]

The majority quotes that part of the *Jones & Laughlin* opinion which refers to a "statutory proceeding." One thing that is clear from *Curtis v. Loether*, and *Pernell v. Southall Realty*, is that both decisions flatly reject any distinction between "Suits at common law" and "statutory proceedings." Both cases involved statutory proceedings. The first was a statutory proceeding seeking recovery of a money judgment for housing discrimination. It was held to be an action at law. The second was a statutory proceeding seeking possession of land. It, too, was held to be an action at law. Thus the fact that the proceeding is statutory is simply irrelevant; as irrelevant as the fact that all federal judicial proceedings are statutory since all federal jurisdiction is statutory.

Moreover the majority quotation from *Jones & Laughlin* is no authority for the proposition that if Congress has relegated the proceeding to an administrative agency the seventh amendment does not apply. I read the quote with the following emphasis:

> "It is argued that the [back pay award] is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. [Citations omitted]. *Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law.* [citations omitted]. It does not apply where the pro-

---

7. *But see* Note, Due Process and Employee Safety: Conflict in OSHA Enforcement Procedures, 84 Yale L.J. 1380, 1380 n.5 (1975).

> ceeding is not in the nature of a suit at common law. [citation omitted].
>
> The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit." 301 U.S. at 48-49. (emphasis supplied).

To rely only on the paragraph referring to statutory proceedings unknown to the common law is to distort Chief Justice Hughes' meaning. The suit was one in which the N.L.R.B. sought injunctive relief in the court of appeals, and incidental to that injunctive relief sought a back pay award. Of course an action for injunctive relief was unknown to the common law. No more can be read into *Jones & Laughlin* than the rejection of a demand for jury trial in the equitable enforcement proceeding. *See Albemarle Paper Co. v. Moody*, 43 U.S.L.W. 4480, 4892-93 (U.S. June 25, 1975) (Rehnquist, J., concurring).

I would concede, however, that Chief Justice Hughes wrote with less than usual precision in the quoted portion of the opinion. To understand why he may have done so, the case should be viewed in its historical setting. The decision was handed down on April 12, 1937, having been argued with four other Wagner Act cases on February 10 and 11, 1937. The back pay issue was peripheral in the extreme. *Jones & Laughlin* involved a frontal attack upon the power of Congress, acting under the Commerce Clause, to regulate the relations between an employer and an employee engaged in production or manufacture. The attack had succeeded in the Fifth Circuit in June of 1936. *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 988 (5th Cir. 1936). In many quarters it was expected to succeed in the

Supreme Court as well since the Court only recently had struck down the N.I.R.A.,[8] the A.A.A.,[9] the Guffey Coal Conservation Act,[10] and the New York minimum wage law.[11] In the election in November of 1936, President Roosevelt not only won reelection with 523 out of 531 electorial votes, but also enormously strengthened his party's power in Congress. On February 5, 1937, just five days before the argument in *Jones & Laughlin* the President sent his "court-packing" proposal to Congress.[12] Four days after the argument, Senator Wheeler introduced a joint resolution proposing an amendment to the Constitution which would permit Congress to overrule by a two-thirds vote a decision of the Supreme Court holding a federal statute unconstitutional.[13] On March 11, 1937, Senator O'Mahoney introduced a joint resolution proposing a constitutional amendment which would prohibit any lower federal court from holding a federal statute unconstitutional, and which would also prohibit such action by the Supreme Court unless two-thirds of the members thereof by specific and separate opinion found it so beyond a reasonable doubt.[14]

Thus *Jones & Laughlin* was *sub judice* during the 66 days of the Court's modern history when it found itself most completely isolated from the other two branches of federal government and most severely under attack. *See, e.g.*, 2 Pusey, Charles Evans Hughes 749-65 (1951); R. Jackson, The Struggle for Judicial Supremacy 176-96 (1941); J. Burns, Roosevelt: The Lion and the Fox 291-304 (1956). The decision in *Jones & Laughlin* and the four other Wagner Act cases handed down the same day marked at least the beginning of the end of the Court's attempt to impose its subjective economic views on the

8. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).
9. United States v. Butler, 297 U.S. 1 (1936).
10. Carter v. Carter Coal Co., 298 U.S. 238 (1936).
11. Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).
12. H.R. Doc. No. 142, 75th Cong., 1st Sess. (1937).
13. S.J. Res. 80, 75th Cong., 1st Sess. (1937).
14. S.J. Res. 98, 75th Cong., 1st Sess. (1937).

nation in the guise of substantive due process.[15] But clearly the Wagner Act cases did not signal an end to the judicial review of congressional delegations of power. It is true that taken out of context, bits and pieces of the Court's *Jones & Laughlin* opinion sound very deferential toward congressional authority to decide what may be committed to an administrative adjudicator. A deferential tone in the climate of the times was perfectly understandable. Deference by the Court to Congress in one set of circumstances, however, cannot be regarded as permanent surrender of constitutional authority. *Compare Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), with *Ex parte Yerger*, 75 U.S. (8 Wall) 85 (1869).[16] *Jones & Laughlin* should be read not expansively, as the majority reads it, but cautiously, and with a thoughtful appreciation of the circumstances surrounding its announcement. Neither the Wheeler nor the O'Mahoney amendments nor Roosevelt's "court-packing" plan ultimately succeeded, and it is still the Court, not Congress, which must ultimately give meaning to the seventh amendment.

The term "statutory proceedings" when referring to administrative proceedings is imprecise because it is overly generic. There are administrative proceedings in the nature of rule-making, rate-setting, or licensing which have nothing at all to do with this case. An earlier generation of judges probably would have called these proceedings legislative. *See, e.g.*, Justice Holmes' description of rate-making in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). What the case *sub judice* involves is administrative adjudication, and the question is what kinds of

---

15. NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); Associated Press v. NLRB, 301 U.S. 103 (1937); Washington, Virginia & Maryland Coach Co. v. NLRB, 301 U.S. 142 (1937).

16. The history of the restoration of the Court's authority from *McCardle* to *Yerger* to pass upon the validity of congressional reconstruction by way of habeas corpus is recounted in 1 C. Fairman, Reconstruction and Reunion, 1864-1888 at 433-514, 558-618 (1971). (Volume VI of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States).

adjudication can be relegated by Congress to decision by executive branch employees rather than by jurors?[17] One answer is that any adjudication which Congress decrees should be committed to the discretion of an executive branch employee may be so delegated. Although the majority opinion in the two sentences quoted earlier nods to the seventh amendment and to the integrity of Article III judicial review, in reality it has simply deferred to Congress' labeling of the proceeding as "administrative." The other answer is that given by the Supreme Court in *Curtis v. Loether*, and *Pernell v. Southall Realty*. Congress cannot relegate fact-finding to any tribunal other than a jury in any proceeding that was in 1791 a "Suit at common law."[18] Principled adjudication of the meaning of the constitutional term must be firmly rooted in the history of the common law, or the courts will be set adrift upon the same sea of subjectivity and arbitrariness which led to the great Court crisis of 1937.

In my dissent to the panel's opinion, I attempted at some length to demonstrate that a proceeding, the sole object of which is the obtaining of an *in personam* money judgment, is a "Suit at common law" and thereby deserving of seventh amendment protection. I again dissent because I am unwilling to accept the majority's view that an Article III court charged with interpreting the Constitution's mandate must blindly defer to a Congressional direction that the proceeding below be labeled something else. Although I am completely in sympathy with the goals Congress sought to achieve in enacting the Occupational Safety and Health Act, the limitations on the exercise of federal power as set forth in the Constitution must, however, be observed by the legislative branch. Scrupulous

---

17. *Cf.* Comment, The Authority of the Circuit Judicial Councils: Separation of Powers in the Courts of Appeals, 5 Seton Hall L. Rev. 864 (1974).

18. See note 6, *supra*. *See generally Albemarle Paper Co. v. Moody*, 43 USLW 4880, 4892-93 (U.S. June 25, 1975) (Rehnquist, J., concurring).

regard for such principles may often seem to delay the attainment of desirable social goals, but as artificial as they sometimes appear, in the long run, they serve the higher purpose of preserving constitutional government.[19]

GARTH, *Circuit Judge*, dissenting:

Although I agree with the *legal analysis* set forth by Judge Gibbons in his opinions dissenting from both the panel and en banc majorities, I disagree strongly with his *political analysis* (pages 17-19 of the en banc dissent) of the reasoning underlying the Supreme Court's decision in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). I am critical of any analytical approach which attributes a court decision to the political motivations and other extra-judicial considerations of the five Justices who joined in the majority opinion.

I do not believe that fear of "court-packing" or other "reprisals" governed the decisions of the Supreme Court in 1937 any more than I believe that considerations of "reprisal" or "reward" dictate the decision of members of the judiciary today. The "considerations" about which Judge Gibbons writes are not the product of evidence and are not matters of judicial record; they are rather political theories advanced by secondary source commentators. If true, they rent great tears in the fabric of justice; if false, they do an enormous disservice to dedicated Justices. In either event, these considerations add nothing to an otherwise analytical and compelling opinion dealing with the ap-

19. *Muniz v. Hoffman*, 43 USLW 4895 (U.S. June 25, 1975) does not suggest a result on the seventh amendment issue different than I propose. There the Court had before it only matters of statutory construction and sixth amendment considerations in the context of "the historic rule that state and federal courts have the constitutional power to punish any [petty] criminal contempt without a jury trial." 43 USLW at 4901. I would not suppose that executive branch agencies have a similar power. *See, e.g.*, ICC v. Brimson, 154 U.S. 447 (1894).

plicability of the Seventh Amendment to the issues presented here. Indeed, in advancing a hypothetical and pseudo-political analysis of considerations which might have motivated the court (an analysis better suited to a law review note than an opinion), Judge Gibbons detracts from an otherwise scholarly dissertation.

I note, to set the record straight, that many of the Justices who ultimately constituted the majority in *Jones & Laughlin, supra*, had consistently been in the minority in those cases decided prior to the November 1936 election,[1] which are cited by Judge Gibbons in his opinion at 18. In *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) Chief Justice Hughes and Justices Brandeis, Stone and Cardozo were the dissenters. When Justice Roberts joined Chief Justice Hughes and Justices Brandeis, Stone and Cardozo in *Jones & Laughlin*, the former dissenters finally became the majority. How can it be said that the "majority" vote which had been developing prior to the 1936 election was the sole product of post-1936 political considerations? I prefer not to indulge in political and historical speculation but to read a Supreme Court opinion for what it says. I perceive nothing in the *Jones & Laughlin* decision which in any way suggests that the result was based on other than proper judicial considerations based upon matters of record.[2]

Therefore, I disassociate myself from the dissent's political analysis, while at the same time joining in Judge Gibbons' otherwise excellent opinion, holding that the

---

1. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. Butler, 297 U.S. 1 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

2. Even if there is validity in the contention that political considerations dictated the principal holding in Jones & Laughlin (a contention which I do not accept), it is absurd to suggest (as Judge Gibbons does in his opinion at 17) that every "peripheral" issue in that opinion is similarly controlled. Certainly Judge Gibbons does not demonstrate in his opinion nor is there any indication given in his historical analysis, that there was any prevailing political sentiment in 1937 *as to the "back pay/Seventh Amendment"* issue, the only issue relevant here. Resolution of this "peripheral" issue was by no means legally or analytically dictated by the Court's holding that the Act itself was constitutional.

Seventh Amendment mandates a jury trial with respect to penalty proceedings under the Occupational Safety and Health Act.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1765

FRANK IREY, JR., INC., a corporation,
Petitioner

vs.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION; and UNITED STATES DEPARTMENT OF LABOR,
Respondents

(OSHRC Docket No. 701)

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Present: SEITZ, *Chief Judge* and STALEY, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN HUNTER, WEIS and GARTH, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the Occupational Safety and Health Review Commission and was argued and later reargued en banc by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said

Occupational Safety and Health Review Commission dated August 1, 1973, be, and the same is hereby affirmed with respect to the order assessing penalties for violations of § 1926.652 (h), 1926.401 (f), 1926.150(c)(1) (viii), 1926.350 (a)(1), 1927.51 (c), and 1926.51 (a)(1). The order of the Occupational Safety and Health Review Commission with respect to the violation of 29 C.F.R. 192.652(b) is vacated and remanded for further consideration not inconsistent with this opinion.

ATTEST:

/s/ Thomas F. Quinn
Clerk

July 24, 1975

Certified as a true copy and issued in lieu of a formal mandate on August 15, 1975.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1765

FRANK IREY, JR., INC., a corporation,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, UNITED STATES DEPARTMENT OF LABOR and PETER J. BRENNAN, Secretary of Labor,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Argued June 13, 1974

Before: STALEY, GIBBONS and WEIS, *Circuit Judges*

Oliver N. Hormell, Esquire
423 Third Street
California, Pa. 15419

McNeill Stokes, Esquire
Attorneys for Petitioner

Of Counsel:
William J. Kilberg, Esquire
Solicitor of Labor

Benjamin W. Mintz, Esquire
Associate Solicitor for Occupational Safety and Health

Irving Jaffe, Esquire
Acting Asst. Attorney General

Stephen F. Eilperin, Esquire
Michael H. Stein, Esquire
Department of Justice
Washington, D. C.

Michael H. Levin, Esquire
Counsel for Appellate Litigation

Ann Mason Noble, Esquire

Neil H. Koslowe, Esquire
Attorneys for Respondents

OPINION OF THE COURT

(Filed November 4, 1974)

WEIS, *Circuit Judge.*

The petitioner employer launched a broad based attack on the Occupational Safety and Health Act in this appeal. After a careful review of the record, we find that most of the assault stops short and that the constitutional challenges to the statute must fail. However, on one point there was error, and we conclude that the Occupational Safety and Health Review Commission applied an improper definition of the word "willful" in assessing one of the penalties against the petitioner. We remand for further consideration of that violation.

An employee of petitioner, Frank Irey, Jr., Inc., was killed on January 11, 1972, when a side of the trench in which he was working collapsed onto him. As a result of this tragedy, a Compliance Officer of the Occupational Safety and Health Administration performed an inspection of the work site and determined that the Irey Company had violated a number of OSHA's standards. A citation was issued charging that the employer failed to properly shore the trench and that other violations had occurred as well.

Irey was a contractor which was performing a construction subcontract in Morgantown, West Virginia awarded by the Boeing Company. That organization had caused certain test borings to be made in order to determine soil conditions, and the resulting information was made available to the petitioner. Irey was aware of the

safety requirements for trenching work since its contract proposal to Boeing reiterated the OSHA standards in substance.

In November of 1971, West Virginia state safety inspectors cited Irey for permitting workers to be in a trench fifteen feet deep, the bottom portion of which appeared to be rock but the upper sides of which were composed of soft earth with substantial water content. Harley Six, the petitioner's construction superintendent, ordered a backhoe operator to slope the sides of the trench, and the inspectors then permitted work to continue. The company was cautioned orally and in writing of the necessity for shoring or sloping the sides of trenches composed of unstable or soft material and of the added dangers posed by water accumulation in the soil.

On the day before the fatal accident, a trench was dug about 75 feet to 100 feet from the one which had come to the attention of the West Virginia inspectors some six weeks earlier. This new trench was started by blasting through solid rock. On the following day, softer material was reached, and a backhoe was used for the digging. The trench was about 33 inches wide and was taken down to a depth of about 7½ feet. The sides of the trench were vertical and had not been shored. Some rain had fallen during the previous night, and water was pumped out from the 6 to 10 feet area of the trench which had been left open. The decedent then began to lay pipe on the bottom, and thereafter backfill consisting of limestone chips was put into the excavation. It was about noon when the accident occurred.

At the hearing before the OSHA examiner, superintendent Six testified that he thought he was digging in shale and that consequently the trench did not have to be shored according to OSHA regulations.[1] He referred to test boring reports which he said described the soil in the

---

1. *See* 29 C.F.R. 1926.652(b), Table P-1.

area as brown to dark brown weathered shale with silty clay seams.

The employer also called a soils expert who performed some test borings in the vicinity of the accident some months afterward. This witness described the area as being of weathered limestone which, although similar to weathered shale in appearance, has more of a tendency to slide, particularly when wet.

The hearing officer found that the petitioner was guilty of a willful violation of § 5 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654 (1970), (the general duty section of the Act) and of the standards relating to support of trenches published at 29 C.F.R. § 1926.652(b).[2] The Secretary of Labor's proposed sanction of $7,500.00 for this violation was reduced to $5,000.00, and penalties were assessed for other violations of standards which are not of particular relevance at this juncture.

The Occupational Safety and Health Review Commission[3] exercised its discretion to review the case, and findings were affirmed. One of the three members dissented on the ground that the hearing officer had misinterpreted and misapplied the term "willful."

---

2. "Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped or otherwise supported . . ." (1973). The effective regulation in 1972 required those precautions for trenches four feet or more in depth.

3. The Review Commission is composed of three members appointed by the President for 6 year terms. The Commission is independent of the Secretary of Labor. It is authorized to appoint hearing examiners (now called administrative law judges) whose decisions it is authorized to review on a discretionary basis. 29 U.S.C. § 661 (1970). The Commission was established to counter congressional complaints that earlier versions of the Occupational Safety and Health Act would have made the Secretary of Labor, in effect, prosecutor, judge, and jury in violation cases.

The Commission's function was designed to be adjudicative, and formulation of standards, together with the prosecution role, was assigned to the Secretary.

In this case, one of the Commissioners, *sua sponte*, proposed that consideration be given to raising the Secretary's proposed penalty of $7,500.00 to $10,000.00. We suggest that by claiming such power the Commission invites criticism of its impartiality or at least its appearances. The Commission's assertion of a policy role was treated with disfavor in Madden v. Hodgson, — F.2d — (No. 72-1874, 9th Cir. July 29, 1974). *Cf.* Brennan v. Occupational Safety and Health Review Commission, 492 F.2d 1027 (2d Cir. 1974).

The petitioner has chosen to attack the constitutionality of the Act on a variety of bases, asserting that the enforcement procedures involve an unlawful delegation of power to the executive branch and that the penalties, though denominated civil, are in fact criminal in nature. Some of the procedures to which the petitioners object, that is, the power of the Commission to increase a proposed penalty, the vagueness of the general duty section, an employer's Sixth Amendment right to be confronted with his accusers, and the imposition of penalties pending determination of an appeal, are not involved in this case, and consequently, we will not decide them.

As provided by the Act, the OSHA inspector who visited the scene of the fatality issued citations against the Irey Company for a number of violations which he found. Included with each was a suggested penalty which would have been binding on the company had it not advised OSHA of its intent to contest the citations.[4] After Irey filed its notice of contest, the case was assigned to a hearing officer of the Review Commission who conducted the hearing at which both the Secretary and the employer presented evidence.

We need not recapitulate the Act in detail here.[5] Basically, it authorizes the Secretary of Labor to establish standards for safe working conditions at places of employment throughout the United States. OSHA inspectors are authorized to visit job sites and issue citations for violations of specific standards or the broad "general duty" clause.[6]

---

4. 29 U.S.C. §§ 658(a), 659(a), 659(c) (1970).

5. *See* the general review of the Act and its purposes in Brennan v. Occupational Safety and Health Review Commission, 487 F.2d 438 (8th Cir. 1973), and Brennan v. Occupational Safety and Health Review Commission, 491 F.2d 1340 (2d Cir. 1974).

6. 29 U.S.C. § 654 (1970):

"(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter."

Violations fall into four categories:

1. *De minimis*, where no monetary penalty is invoked;
2. Non-serious, where penalties of up to $1,000.00 may be assessed;
3. Serious violations, defined as those which create a substantial probability of death or serious physical harm, where a mandatory penalty of up to $1,000.00 is provided; and
4. Willful or repeated violations, where a civil penalty of up to $10,000.00 may be assessed. The term "willful" is not defined by the statute.

Suits for recovery of the penalties may be brought in the district court, but there is no provision for review of the fact of violation or amount of penalty in that forum.[7] Criminal liability can be invoked in a situation where there is a willful violation which causes death to an employee. Imprisonment for six months and/or a fine of $10,000.00 may be imposed in such an event. Since no mention is made of the forum in which such a proceeding is to be conducted, it may be assumed that it is in the district court.

Petitioner emphasizes that as to a corporation, the criminal punishment of a fine of $10,000.00 is precisely the same as the civil penalty for a "willful" violation without the constitutional protections afforded a criminal defendant. Thus, the argument goes that the employer is deprived of rights guaranteed by the Fourth, Fifth, Sixth and Seventh Amendments and is not allowed an appeal to the courts on factual issues.

---

7. In the House debate, it was stated that this provision should be narrowly construed and was intended to be limited to any process which might be necessary to actually collect the penalty. 116 Cong. Rec. 42207 (1970). Contrast this procedure with the one provided by the Coal Mines Health and Safety Act, 30 U.S.C. §819(a)(3) (1969), where findings of fact are required before a penalty is assessed and where an employer is entitled to a limited *de novo* hearing in the district court. *See also* 2 Recommendations and Reports of the Administrative Conference of the United States 67, 896 (1970-72), Appendix to the report of Professor Harvey J. Goldschmid compiling the statutes which provide for the use of civil penalties by federal agencies.

There is force and logic to these arguments, and we do not dismiss them lightly. Fatal to the petitioner's view, however, is a series of Supreme Court decisions which have validated the position that Congress has a wide range of alternatives available to it for enforcing its legislative policy through administrative agencies. Thus, in *Helvering v. Mitchell*, 303 U.S. 391 (1938), it was held that monetary sanctions may be imposed administratively without invoking the judicial power, despite the contention that such penalties are essentially criminal in nature. The Court there also held that the same conduct may subject a person to both civil and criminal sanctions, if the civil aspects are considered remedial.[8]

In the case *sub judice*, candor compels us to concede that the punitive aspects of the OSHA penalties, particularly for a "willful" violation, are far more apparent than any "remedial" features. However, a deliberate and conscious refusal to abate a hazardous condition may bring about a situation where a heavy civil penalty might be needed to effect compliance with safety standards. In any event, we have now come too far down the road to hold that a civil penalty may not be assessed to enforce observance of legislative policy. *See*, for example, *Oceanic Steam Navigation Co. v. Stranaham*, 214 U.S. 320 (1909), and *Hepner v. United States*, 213 U.S. 103 (1909). Although the label attached by Congress does not preclude judicial review of a statute which transgresses a constitutional right, no such infraction has occurred here.[9] *American Smelting & Refin-*

8. *Cf.* United States v. U.S. Coin and Currency, 401 U.S. 715, 718 (1971), where the Court observed there that "From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674, as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force . . ." In Astol Calero-Toledo v. Pearson Yacht Leasing Co., — U.S. —, 42 U.S.L.W. 4693 (May 15, 1974), however, a Puerto Rican forfeiture statute, which sufficiently furthered punitive and deterrent purposes, was upheld against a constitutional challenge.

9. In United States v. J. B. Williams, Inc., — F.2d — (No. 73-1624, 2d Cir. May 2, 1974), Judge Friendly said, "[w]hile Congress could not permis-

ing Co. v. Occupational Safety and Health Review Commission, — F.2d — (No. 73-1721, 8th Cir. July 15, 1974).

Much of the petitioner's opposition is centered on the fact that the civil penalties are imposed, not through normal judicial processes but by administrative action—that is, by the executive branch with very narrow judicial review.[10]

It may be that Congress, by giving broad enforcement roles to OSHA and granting it the power to assess heavy penalties while at the same time limiting the scope of judicial review, has come close to the line which separates executive and judicial powers. However, we do not think that the line has been crossed. The legislation is still in the area where congressional discretion may be exercised, and the question is one of the wisdom of a course of action—not its constitutionality. In that context, of course, we must defer to the legislative judgment.[11]

---

9. (Cont'd.)

sibly undermine constitutional protections simply by appending the 'civil' label to traditionally criminal provisions, the statute here at issue is plainly not of that class." Slip opinion at 3155. That case involved the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.* under which defendants were assessed civil penalties of $500,000.00.

10. This objection was forcefully expressed by a number of witnesses and statements during the hearings of the House Select Subcommittee on Labor, Occupational Safety and Health Act of 1970 (Oversight and Proposed Amendments) (92nd Cong. 2nd Sess., 1973).

11. The dissent focuses on another disturbing element of this case—the denial of a jury trial under the Seventh Amendment. The majority, too, has serious misgivings as to the wisdom of limiting *de novo* review but does not agree with the dissent's conclusion of unconstitutionality. We do not think that the differences between *in rem* and *in personam* actions are sufficient to distinguish the thrust of such precedents as Oceanic Navigation Co. v. Stranahan, 214 U.S. 320 (1909). In that case the Court refused to accept the proposition that Congress could not authorize the imposition of a penalty and commit its collection to an administrative office without the necessity of resorting to the judicial power. This view was tempered somewhat by Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932), which interpreted the statute to require a fair hearing and determination by the administrative officer upon facts produced in evidence. *See also* Gellhorn, *Administrative Prescription and Imposition of Penalties*, WASH. U. L.Q. 265 (1970); James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).

However, we do share Judge Gibbons' reservations about the extremely limited scope of judicial review and the absence of opportunity to a *de novo* trial on the merits. While the prospect of burdening the courts with large numbers of appeals is a matter of concern from the standpoint of efficient judicial administration, we think experience demonstrates rather conclusively that in cases of this nature *de novo* review is seldom requested. It is the availability of the remedy, not its infrequent utilization, which is important to

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Court considered the question of the criteria to be applied in determining whether sanctions are penal or regulatory in nature. The Court said that in the absence of an expression of congressional intent such factors as *scienter*, punishment, and excessiveness, *inter alia*, may be weighed. We do not perform any such analysis here because the congressional intent is clear.[12]

Irey also objects to the procedures permitting the Secretary to propose a penalty which becomes final unless contested by the employer.[13] According to the petitioner, this placed an undue and illegal burden on him. We find no merit to this contention. The procedures are expressly authorized by the statute and are an acceptable way to commence an administrative proceeding. From a practical standpoint, the burden on the employer to respond is little different than that which requires a party to answer a complaint within a given time on penalty of a default judgment for a fixed sum. *Cf. Morton v. Delta Mining, Inc.*, 495 F.2d 38 (3d Cir. 1974).

The self-executing aspect of the Act is not violative of due process because an employer is given adequate oppor-

---

11. (Cont'd.)

the cause of justice. The mere existence of a local fire department is a source of satisfaction to a citizen, even though he would hope that he would never be forced to seek its assistance.

We perceive no overriding consideration which favors the congressional policy of recent years to insulate administrative adjudication from the open and searching examination that full judicial review provides. The necessity for an administrative agency on occasion to submit its determination to the scrutiny of a jury of citizens would be a healthful and disciplining experience.

The statutory court in Lance Roofing Co. v. Hodgson, 343 F. Supp. 685 (N.D. Ga. 1972), *aff'd* 409 U.S. 1070 (1972), also expressed concern about judicial review, particularly as to penalties which may be assessed for failure to abate alleged continuing violations.

12. *But see* Hay, *OSHA Penalties: Some Constitutional Considerations*, 10 IDAHO L. REV. 223 (1974), wherein a *Mendoza-Martinez* analysis was performed. We note also the comments of Senator Dominick on civil penalties: ". . . We did it this way because I think most of us know how difficult it is to get an enforceable criminal penalty in these type of cases. Over and over again, the burden of proof under a criminal-type allegation is so strong that you simply cannot get there, so you might as well have a civil penalty instead of the criminal penalty and get the employer by the pocketbook if you cannot get him anywhere else." 116 Cong. Rec. 37338 (1970).

13. 29 U.S.C. §659 (1970).

tunity for a hearing at a time when deprivation can still be averted. An employer who chooses not to file a timely contest is deemed to have waived his right to a hearing. The citation adequately apprises him of his right to contest and of the manner in which it is to be done; subsequent silence, therefore, is properly viewed as a knowing and intelligent waiver.

The discretion granted to the Commission to assess penalties is conditioned upon consideration of four factors:

1. Size of the employer;
2. Gravity of the violation;
3. Good faith; and
4. Previous history.[14]

We find the action of the administrative agency in applying those standards to these facts to be reasonable and within the scope of statutory authority.

When the delegation of legislative authority to an administrative agency is broad in scope, the courts have a greater role to play to prevent or correct disparate treatment of those subjected to regulation. Furthermore, it is the duty of the courts to interpret the statute under which the agency functions and to determine whether the agency is acting within the congressional purpose. *See* Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

It is in this spirit that we approach the issue raised by the dissenting member of the Commission on the proper interpretation of the term "willful."[15]

---

14. 29 U.S.C. § 666(i) (1970). *But see* Madden v. Hodgson, *supra*.

15. The statement of Chief Judge Bazelon in Wellford v. Ruckelshaus, 439 F.2d 598, 603 (D.C. Cir. 1971), is apt. In remanding for reconsideration, he said, "this course is especially appropriate in view of the fact that we are venturing into a new and uncharted area of the law. A new public sensitivity to issues of environmental protection has imposed new responsibilities on the courts, the legislature, and the administrative agencies. A new Environmental Protection Agency has been established, and its Administrator has the critical task of developing standards for administrative action throughout this area . . ."

The hearing officer concluded that a willful violation may exist under the Act when the employer commits an intentional and knowing violation and is conscious that his action is proscribed or, if the employer is not consciously violating the Act, when he is aware that a hazardous condition exists and makes no reasonable effort to eliminate the condition.

The hearing officer found that the failure to shore the trench was a willful violation of the Act even though the superintendent "either misconstrued or misunderstood" the test boring data.[16] He summarized by saying, "Respondent [Irey], in effect, admits that he did not ascertain beforehand the true nature of the soil which it was excavating, or that it failed to either comprehend from the information it had what was the true composition of the material it was excavating." The decision concluded that the knowledge of the citation issued by the state in November of 1971 and the failure to acquaint itself with "the full facts" constituted a willful violation by the employer.

The Act defines a "serious" violation as one which requires proof of a substantial probability that death or serious harm could result from a condition, "unless the employer did not, and could not with the exercise of reasonable diligence know of the presence of the violation."[17] To rephrase, a finding of a "serious" violation requires that the condition was hazardous and that the employer knew or

---

16. The examiner found that the bottom of the trench was at elevation 1054. Test boring report No. 107 shows shale beginning at elevation 1053.5 or 6 inches below the bottom of the trench, and the hearing officer concluded that the bottom of the trench was 6 inches above the level of the shale seam. However, he failed to note that the test boring was some 30 feet from the scene of the fatality. Another test boring, No. 105, approximately 45 feet from the accident scene showed the shale at elevation 1058.3, indicating that the level was rising from the point at test boring No. 107 to where the accident occurred. Furthermore, the soil expert, whose testimony was not contradicted, pointed out that the reports indicated that the rock levels were higher than the hearing officer found them to be. We make this point not to reverse the examiner's findings of fact but to point out that the difference in interpretation of the technical data weakens any inference that conscious wrongdoing was involved.

17. 29 U.S.C. § 666(j).

should have known of it—precisely the alternative definition of "willful" which the hearing officer adopted.

It is obvious from the size of the penalty which can be imposed for a "willful" infraction—ten times that of a "serious" one—that Congress meant to deal with a more flagrant type of conduct than that of a "serious" violation. Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission—it involves an element of obstinate refusal to comply.

The meaning of willfulness changes with the context in which it appears. Thus, willfulness in a tax case, *e.g.*, *United States v. Bishop*, 412 U.S. 346, 360 (1973), varies from the definition in a suit for a penalty for failing to unload cattle, *e.g.*, *United States v. Illinois Central Railroad*, 303 U.S. 239, 242 (1938).

We believe that a restrictive definition is appropriate here since otherwise there would be no distinction between a "serious" offense and a "willful" one. The lack of demarcation would permit the agency to assess a higher penalty than that which is authorized for conduct defined as a "serious" violation. A broad interpretation of "willful" would disrupt the gradations of penalties and violations so carefully provided in the Act.

The government has the burden of establishing that an offense was willful,[18] and this court has the power to determine whether that burden has been met. *National Realty v. Occupational Safety and Health Review Commission*, 489 F.2d 1257 (D.C. Cir. 1973). However, since the Commission here based its judgment on an erroneous legal standard, we think it appropriate to remand for further consideration.

We have reviewed the record applicable to the other violations assessed against the petitioner and find no error.

---

18. 29 C.F.R. § 2200.73(a) (1973).

The Commission's decision finding a willful violation of 29 C.F.R. 192.652(b) is vacated and remanded for further consideration not inconsistent with this opinion. The order assessing penalties for violations of §§ 1926.652(h), 1926.401(f), 1926.150(c)(1)(viii), 1926.350(a)(1), 1926.51 (c), and 1926.51(a)(1) will be affirmed.

GIBBONS, *Circuit Judge*, dissenting:

Although I agree with most of what the majority opinion says, I dissent from the judgment enforcing the administrative civil penalty on the single and narrow ground that the administrative civil penalty device violates the seventh amendment. As Judge Weis' opinion makes clear, suits for recovery of the penalties assessed by the administrative agency may be brought in the district court, Pub. L. No. 91-596, § 17, 29 U.S.C. § 666(k), but the only judicial review afforded with respect to the fact of violation or the amount of the penalty is in this court. Pub. L. No. 91-956, § 11(a), 29 U.S.C. § 660(a). Although the language of 29 U.S.C. § 666(k) is far from clear, the legislative history referred to in footnote 7 of the majority opinion suggests that the role of the district court is to do nothing other than issue execution on what is essentially an administrative in personam money judgment.

The central feature of the compromise which produced the Constitution of 1787 was the empowerment of the national government to act directly upon persons rather than, as under the Articles of Confederation, on member States. The extent of the transfer of sovereignty to act upon citizens directly was set forth in Article III. One express limitation upon the central government's power is the provision in Article III, § 2 that the trial of all crimes shall be by jury. When the Constitution was presented to the ratifying conventions the people, fearful of the aggrandizement of power in the national government, insisted

on further limitations which were in 1791 incorporated in the Bill of Rights. One of those limitations is the seventh amendment, which guarantees jury trials in civil actions at law. A suit for the recovery of an in personam money judgment is certainly an action at law.

If the civil penalty provisions of the Occupational Safety and Health Act were to be construed as penal, the jury trial provision of Article III, § 2 would apply, as would the double jeopardy clause of the fifth amendment. The respondent so contends, but I agree with the majority that it is now well settled that Congress can, in enforcing federal policies, choose civil or penal remedies, alternatively or concurrently, at least within the limits suggested in cases such as *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). I agree as well, although with considerable misgivings, that the civil penalty provisions in OSHA fall within the civil parameters delineated in the cases, and thus that the statute does not infringe the right to a jury trial guaranteed in Article III, § 2.

The civil jury trial guarantee of the seventh amendment is not so easily disposed of. The statute permits the determination of a civil penalty without jury trial, which can be reduced to an in personam money judgment and executed upon. If in 1791 an action for such a money judgment would have been an action at law, it follows that the action falls, today, within the amendment. *See Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830); *Fleitmann v. Welsbach Lighting Co.*, 240 U.S. 27 (1916). Not every legal proceeding whereby the government might recover money was in 1791 an action at law. The same First Congress which recommended the ratification of the seventh amendment recognized as much when it enacted the Act of July 31, 1789, ch. 5, 1 Stat. 29, "An Act to regulate the collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States." That statute created ports of entry

and designated collectors of customs,[1] imposed tonnage duties on vessels[2] and import duties on goods,[3] and provided that the exactions could be collected by detaining the vessels or the goods.[4] This has been the uninterrupted course of customs duties assessment in the United States ever since; in rem against the importing vessels.[5] Neither libels in admiralty nor customs valuation proceedings were in the Colonies, in England, or in the States prior to 1791 actions at law. The First Congress, which simultaneously considered both the text of the seventh amendment and the first customs act was well aware of the distinction. There is no indication that it believed an in personam judgment for more than $20.00 could after ratification of the proposed bill of rights be recovered by the government without a jury trial. The customs law was revised extensively by the Act of March 2, 1799, ch. 22, 1 Stat. 627. That act imposed not only in rem penalties against the vessel, but civil and criminal penalties against the master. It was still in effect, with certain amendments, when in 1870 the case of *United States v. The Queen*, 27 F. Cas. 669 (No. 16,107) (S.D. N.Y. 1870) came before then district judge, later Justice, Blatchford. That case started when the United States Attorney filed an information against both the master and the vessel for breach of certain duties imposed by the customs laws, seeking forfeitures in excess of twenty dollars. The case against both was tried before the district court, which held that it had admiralty jurisdiction to enforce the penalty against the vessel in rem. Judge Blatchford went on to hold:

> "The remaining questions are, as to whether there can be joint suit against the vessel and the master, and as to whether the master is entitled to a trial by

1. Act of July 31, 1789, ch. 5, § 1, 1 Stat. 29.
2. Act of July 20, 1789, ch. 3, 1 Stat. 27.
3. Act of July 4, 1789, ch. 2, 1 Stat. 24.
4. Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39.
5. The statute also provided for civil penalties recoverable in an action at law, Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39, § 36, 1 Stat. 47.

jury, and as to whether this suit, if not maintainable as to both vessel and master, can be dismissed as to the master, and yet a decree be rendered in it against the vessel.

As regards the enforcement of the penalty against the master, he is entitled to a trial by jury. The seventh amendment to the Constitution of the United States provides, that, in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. The expression "suits at common law," as there used, means all civil suits, in which legal rights are to be ascertained and determined, which are not of equity or admiralty jurisdiction, whatever may be the peculiar forms of such suits. Parsons v. Bedford, 3 Pet. [28 U.S.] 433, 447. The ninth section of the judiciary act of September 24, 1789 (1 Stat. 76, 77), declares, that the trial of issues of fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury. The suit against the master, under the statute in question, for the penalty imposed, is not made by statute cognizable in admiralty, nor is there any provision that the penalty may be recovered against the master summarily, by libel, as there is in respect to the vessel." 27 F. Cas. at 671.

Judge Blatchford dismissed the case against the master but sustained the libel against the vessel, rejecting the contention that because of the misjoinder the libel should fall. The latter contention was raised by the owner on appeal to the old Circuit Court, which held that it was proper to discharge the master on the claim that he was entitled to a trial by jury, and that his misjoinder did not affect the in rem proceeding against the vessel. *United States v. The Queen*, 27 F. Cas. 672 (No. 16,108) (C.C.S.D. N.Y. 1873). I have found no earlier instance in which any attempt was

made to proceed civilly in personam against a master under the customs laws in a summary proceeding. All of the subsequent civil penalties cases under the customs laws are in rem proceedings. A case demonstrating the essentially in rem nature of proceedings under the customs laws, though not involving a civil penalty, but a disputed assessment of duty, also written by Justice Blatchford, is *In re Fassett*, 142 U.S. 479 (1892). Others include *Passavant v. United States*, 148 U.S. 214 (1893) and *Origet v. Hedden*, 155 U.S. 228 (1894). I have found no case arising under the customs laws which sustained an administrative civil penalty exacted in personam rather than in rem.

The first attempt by Congress to deal with the business of importing people (aside from measures for the suppression of the slave trade) was the Act of March 2, 1819, ch. 46, 3 Stat. 488. Concerned over inhumane treatment of immigrant passengers, Congress determined to enact limitations upon the number of passengers a vessel could safely carry. It forbade vessels landing at United States ports from carrying more than two passengers for every five tons of vessel according to customs house measurement. For an enforcement mechanism it turned to the example of the earlier customs laws, enacting in personam civil penalties and in rem forfeitures. Section 1 provided that the owner would be liable to forfeit to the United States $150.00 for each excess passenger " . . . to be recovered by suit, in any circuit or district court of the United States, where the said vessel may arrive, or where the owner or owners aforesaid may reside . . . . " Quite obviously the forfeiture could be collected by a libel against the vessel in the district court, as to which there would be no jury trial, or by an in personam action in the old circuit court where the owner resided, as to which there was a right to a jury trial.[6] The Act of February 22, 1847, ch. 16, § 1, 9 Stat. 127 added criminal provi-

6. Section 2 provided for total in rem forfeiture of the vessel for overloading by more than twenty passengers. Section 3 created a private cause of action for passengers suffering from short allowances "to be recovered in the same manner as seamans wages are or may be recovered."

sions, and a major revision of the Act of March 3, 1855, ch. 213, 10 Stat. 715, in § 19 saved the earlier penalty provisions from repeal. 10 Stat. 721. These passenger vessel safety laws provided the models for an enforcement mechanism when Congress, in 1882, first passed a comprehensive immigration law. Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.[7] That Act imposed a head tax of fifty cents an immigrant passenger, and provided:

> "The duty imposed by this section shall be a lien upon the vessels which shall bring such passengers into the United States, and shall be a debt in favor of the United States against the owner or owners of such vessels; and the payment of such duty may be enforced by any legal or equitable remedy." § 1, 22 Stat. 214.

The immigration laws went through a general recodification in the Act of March 3, 1891, ch. 551, 26 Stat. 1084 and a general revision in the Act of March 3, 1903, ch. 1012, 32 Stat. 1213. Although there were criminal and civil judicial remedies in these statutes, the basic enforcement mechanism continued to be the imposition of duties upon owners and masters of vessels, enforceable by detaining the vessel. These proceedings were clearly in rem. Such an enforcement mechanism was challenged in *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909) on the ground that it was penal. Justice White for the Court rejected that contention, and his opinion is frequently cited as authority for an extensive discretion in the Congress to choose civil rather than penal means. The case does not speak to the seventh amendment, however, because although the penalties were challenged in a suit for a refund, they had been exacted by detaining the vessel and paid to obtain its release. The proceeding was in rem. Similar enforcement devices were continued in the Quota Act of 1921, Act of May 19, 1921, ch. 8, 42 Stat. 5, as amended, and the Immigra-

7. See an earlier limited immigration law, Act of March 3, 1875, ch. 141, 18 Stat. 477.

tion Law of 1917, Act of February 5, 1917, ch. 29, 39 Stat. 874, as amended. These were challenged in *Elting v. North German Lloyd*, 287 U.S. 324 (1932) and *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329 (1932). The due process contention was once more rejected, but as in *Oceanic Navigation Co. v. Stranahan, supra*, no seventh amendment issue was presented since the exactions had been paid in order to obtain clearance of the vessel. *See also Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98 (1937). I have found no case arising under either the passenger safety laws or the immigration laws sustaining an administrative civil penalty exacted in personam rather than in rem.

One other line of cases which must be considered is that commencing with *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855). That case, too, arose out of the collection of import duties. The same Act of July 31, 1789 which created the method for collecting customs duties had provided in § 9:

> "That . . . the collectors of the different ports shall at all times pay to the order of the officer who shall be authorized to direct the same, the whole of the monies which they may respectively receive by virtue of this act (such monies as they are otherwise by this act directed to pay, only excepted), and shall also, once in every three months, or oftener if they shall be required, transmit their accounts for settlement to the department or officer before mentioned." 1 Stat. 38.

The collectors thus were fiduciaries collecting monies on behalf of the Treasury of the United States and under a duty to account as such. In 1820 Congress enacted "An Act providing for the better organization of the Treasury Department", Act of May 15, 1820, ch. 107, 3 Stat. 592, which designated specific officers in the Treasury Department for the enforcement of the fiduciary obligations of federal fiscal officers. The statute provided in § 2:

> "That . . . if any collector of the revenue . . . who shall have received the public money before it is paid

> into the Treasury of the United States, shall fail to render his account, or pay over the same in the manner, or within the time required by law, it shall be the duty of the first Comptroller of the Treasury to cause to be stated the account of such collector . . . exhibiting truly the amount due to the United States, and certifying the same to the agent of the Treasury, who is hereby authorized to issue a warrant of distress against such delinquent officer . . . ." 3 Stat. 592.

The same section authorized the execution of such a distress warrant on personal property of the delinquent officer or his sureties. It also provided:

> "And the amount due by any such officer . . . shall be . . . a lien upon the lands, tenements, and hereditaments of such officer and his sureties, from the date of a levy in pursuance of the warrant of distress issued against him or them, and a record thereof, made in the office of the clerk of the district court of the proper district, until the same shall be discharged according to law." 3 Stat. 593.

Section 4 of the 1820 Act provided that any person aggrieved by a distress warrant could sue in the United States district court for an injunction to stay execution, but no injunction could issue unless the complaining party gave bond with sufficient surety to pay any judgment which might result against him, and no injunction would impair the lien imposed by Section 2. 3 Stat. 595.

The famous Samuel Swartwout became collector of the Port of New York in 1830. When his account was audited in 1838 he was short $1,374,119.65, and a distress warrant was issued in that amount. Swartwout owned real estate in New Jersey, and the lien of the distress warrant was prior in time to an execution on a judgment in favor of another creditor. Purchasers at the judgment execution sale brought an action in ejectment against purchasers at the warrant execution sale, contending that the Act of May

15, 1820 was unconstitutional for a host of reasons, including a claimed seventh amendment violation and thus that their title was superior. The opinion of Justice Curtis in *Murray's Lessee, supra,* is often cited in support of a broad authority in Congress to resort to summary remedies for the collection of debts claimed to be due the United States. More refined analysis than is sometimes made, however, leads me to conclude that it is no authority for the proposition that there is no right to a jury trial when the United States seeks to recover an in personam money judgment. In the first place, although the plaintiffs urged the seventh amendment[8] Justice Curtis does not discuss it. Possibly this silence reflects a conclusion that remote successors to Swartwout's title lacked standing to assert his right to a jury trial rather than to the provision for equitable relief set forth in Section 4. But more likely Justice Curtis did not take the seventh amendment claim seriously, because Swartwout was a fiduciary under a duty to account. The enforcement of the duty of a fiduciary to account is a matter of equitable jurisdiction. *See* 4 *Pomeroy's Equity Jurisprudence* 1978-79 (5th ed. 1941). Secondly, the case involved an in rem proceeding. The lien of the United States, under foreclosure of which the successful defendant held title, had not resulted from the execution of an in personam judgment against Swartwout. Thus the case, for seventh amendment purposes, is indistinguishable from those arising under the customs, immigration, and vessel safety laws. The statute sustained in *Murray's Lessee v. Hoboken Land and Improvement Co., supra* has served as the model not only for those statutes securing the federal fisc from defaulting fiduciaries, but also for those securing the internal revenue. *See* Act of July 13, 1866, ch. 184, § 9, 14 Stat. 107, now codified in the Internal Revenue Act, 26 U.S.C. § 6321. These in rem lien statutes do not present a seventh amendment problem.

We come, then, to the case upon which the government places its chief reliance. In *Helvering v. Mitchell,* 303 U.S.

8. See 59 U.S. (18 How.) at 273.

391 (1938), the Supreme Court sustained the 50% civil fraud penalty provisions of the Revenue Act of 1928, ch. 852, § 293, 45 Stat. 791. The case arose on certiorari to the Second Circuit which had reviewed a decision of the Board of Tax Appeals. The chief attack upon the statute was that it was penal. Justice Brandeis rejected this contention. In the course of his discussion he wrote:

> "Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury,[7] . . .
>
> 7. *Passavant v. United States*, 148 U.S. 214; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320; *Elting v. North German Lloyd*, 287 U.S. 324, 327-28; *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 334; cf. *Hamburg-American Line v. United States*, 291 U.S. 420; *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98. Compare also *San Souci v. Compagnie Francaise de Navigation A Vapeur*, 71 F.(2d) 651, 653 (C.C.A. 1); *Lloyd Royal Bel e. S.A. v. Elting*, 61 F.(2d) 745, 747 (C.C.A. 2); *Navigazion e Libera Triestina v. United States*, 36 F.(2d) 631, 633 (C.C.A. 9); *Clay v. Swope*, 33 Fed. 396 (C.C.D. Ky.). And see cases cited in note 2, *supra*.
>
> Administrative determination of sanctions imposed by the income tax laws has likewise been upheld. *Berlin v. Commissioner*, 59 F.(2d) 996, 997 (C.C.A. 2); *McDowell v. Heiner*, 9 F.(2d) 120 (W.D. Pa.), aff'd on opinion below, 15 F.(2d) 1015 (C.C.A. 3); *Board v. Commissioner*, 59 F.(2d) 73, 76 (C.C.A. 6); *Wickham v. Commissioner*, 65 F.(2d) 527, 531-32 (C.C.A. 8); *Little v. Helvering*, 75 F.(2d) 436, 439 (C.C.A. 8); *Bothwell v. Commissioner*, 77 F.(2d) 35, 38 (C.C.A. 10); *Doll v. Evans*, Fed. Cas. No. 3,969 (C.C.E.D. Pa.)." 303 U.S. at 402-03.

The government urges this statement as dispositive of the jury trial contention, but it is abundantly clear that Justice Brandeis' reference to jury trial is to the guarantee of jury trial in Article III, § 2, and not to the seventh amendment. It is abundantly clear, first in the context of the entire sentence, which goes on to contrast civil versus criminal procedure. It is clear, as well, in the context of the prior sentence, contrasting those constitutional guarantees applicable to criminal prosecutions. Moreover no seventh amendment issue was presented, since the taxpayer had elected to pursue the administrative remedy before the Board of Tax Appeals rather than to pay the tax and sue for a refund in the district court, where he could have had a jury trial. *See* Int. Rev. Code of 1954, § 7422, 26 U.S.C. § 7422, 28 U.S.C. § 1346 and notes. Finally, and most significantly, Justice Brandeis shows a complete awareness of the essentially in rem nature of the tax collection machinery. *See* especially 303 U.S. at 400. Indeed every case listed in footnote 7 to the opinion in *Helvering v. Mitchell* involves a penalty or forfeiture assessed in rem rather than in personam. His principal references I have discussed hereinabove. His reference to jury trial in *Helvering v. Mitchell* is not a reference to jury trial in actions at law guaranteed by the seventh amendment. It is a reference solely to the guarantee in Article III, § 2.

One other case bears mention. In *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court directed the enforcement of a Board order in an unfair labor practice case which required reinstatement and back pay. It was contended that the award of back pay was the equivalent of a money judgment and was in contravention of the seventh amendment. Chief Justice Hughes wrote:

> "The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be

> preserved.' The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. . . . Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. . . . It does not apply where the proceeding is not in the nature of a suit at common law." 301 U.S. at 48 (citations omitted)

Since the essence of the NLRB enforcement proceeding was injunctive relief directed at the cessation of unfair practices, the proceeding was essentially equitable, and incidental money relief could be awarded without a jury trial. But in the case before us, the only relief sought was the recovery of an in personam money judgment. The civil penalty provisions of OSHA cannot be sustained on the ground that they are incident to the grant of equitable relief.

Summarizing, then, no case in the Supreme Court has ever sustained the imposition of an in personam judgment for a civil penalty in a proceeding in which the defendant claimed and was denied the right of jury trial guaranteed by the seventh amendment. Each case on which the government relies involved the rejection of a penal contention, and hence of a different jury trial guarantee, or involved a proceeding in equity or admiralty, or involved a proceeding in rem. *Ross v. Bernhard*, 396 U.S. 531 (1970), holding that the seventh amendment applies in stockholder derivative suits, though not directly in point, certainly suggests the result which I would reach.[9] I am unenthusiastic about narrowing the specific guarantees of the Bill of Rights. In the absence of a case in point in the Supreme Court, I

---

9. Justice Holmes, in *Fleitmann v. Welsbach Co.*, 240 U.S. 27, 29 (1916), noted

> "when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law."

prefer to assume that the seventh amendment still has meaning.

Nor, does it seem, that compliance with the seventh amendment would seriously frustrate the congressional policy of entrusting primary enforcement authority to an administrative agency. Until recently[10] Congress commonly provided for civil penalties which could be proposed by an agency but recovered in a civil suit in which the defendant obtained a trial de novo.[11] With respect to such statutes Professor Jaffe referring particularly to 47 U.S. §§ 503 & 504 of the Federal Communications Act writes:

---

10. A recent survey conducted for the Administrative Conference of the United States on the use of civil money penalties by federal administrative agencies indicated only three other agencies which claim the power to impose sanctions administratively subject to judicial review solely upon the "substantial evidence" test. 2 Recommendations and Reports of the Administrative Conference of the United States 948-52 (Appendix A) (1972).

These include: (1) the modern compilation of sanctions enforced by the Immigration and Naturalization Service collected in Title 8 of the United States Code whose historical antecedents have already been reviewed. The Report noted the three Supreme Court decisions which sustained the administratively imposed civil penalties. (as indicated previously—all in the context of in rem proceedings). *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329 (1932); *Elting v. North German Lloyd*, 287 U.S. 324 (1932); and *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909). *Conference Report* at 952 n.3. (2) The Federal Home Loan Bank Board which is given authority to enforce a number of civil money penalty provisions in Title 12. *See, e.g.*, 12 U.S.C. §§ 1425a(d), 1425b(b). However, as the Conference Report noted, "[c]ounsel for the FHLBB reported that 'there has never been a court appeal' but that review would be limited to considering whether the Board has acted arbitrarily or capriciously." *Conference Report* at 952 n.5. (3) The United States Postal Service which is authorized to impose civil money penalties on private contract carriers pursuant to 39 U.S.C. § 3603 and 49 U.S.C. § 1471. This authority was upheld in *Allman v. United States*, 131 U.S. 31, 35 (1889); *Great Northern Ry. v. United States*, 236 F. 433, 443-44 (8th Cir. 1916). *Allman* however, does not discuss any seventh amendment issue, undoubtedly because the postal contractor had by contract agreed to the administrative determination of a penalty for non-performance. *See Great Northern Ry. Co., supra*, at 439. *Conference Report* at 952 n.6.

In addition to those statutes listed in the Administrative Conference survey, the Endangered Species Act of 1973, 16 U.S.C. § 1540(a) authorizes the Secretary of Interior to assess a variety of civil money penalties subject to judicial review under the "substantial evidence" standard. The provision has not been tested in the courts.

11. The survey conducted for the Administrative Conference, indicated that with the exception of those civil money penalties enumerated in note 10 *supra*, the remaining monetary sanctions were either administratively imposed, or administratively assessed and judicially imposed, by some 34 different executive departments and independent agencies subject always to de novo judicial review.

> "Here it will be seen is a flexible penalty of substantial proportions. By the device of a notice of 'apparent liability', the commission is able to make a semi-formal though legally inconclusive adjudication. It will be seen that by failing to prosecute or by a process of remission and mitigation the Commission has considerable control over the amount of the penalty. To date, so far as I know, in not a single determination of apparent liability has the Government been put to a suit to recover." L. Jaffe, *Judicial Control of Administrative Action* 113 (Student ed. 1965).

Recognizing that there are differences, with respect to the degree of difficulty of the enforcement problem, between OSHA and some of the earlier models such as the Federal Communications Act, still I find it difficult to understand why, with such models in effect and apparently working, Congress has chosen in its more recent regulatory enactments to push so hard and so far in the direction of avoiding compliance with an express provision of the Bill of Rights. I would hold that the civil penalty provisions of OSHA which result in an in personam money judgment, but deprive the defendant of the jury trial guaranteed by the seventh amendment, are unconstitutional.[12]

---

12. In *Brennan v. Occupational Safety and Health Review Comm'n*, No. 73-1131 (3d Cir., Aug. 14, 1974) the seventh amendment issue was not raised in connection with the administrative imposition of a civil penalty because the employer-respondent, while not withdrawing its contest of the Secretary's citation, filed no response to the Secretary's petition for review.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX C
SECRETARY v. FRANK IREY, JR., INC.

OSAHRC Docket No. 701 August 1, 1973

Before MORAN, Chairman; VAN NAMEE and CLEARY, Commissioners

CLEARY, COMMISSIONER: On November 14, 1972, Judge J. Marker Dern issued a decision in this case holding that respondent had violated section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C.A. 651 *et seq.*, by failing to comply with seven safety and health standards duly promulgated by the Secretary of Labor. He found one violation to be willful as charged and six others to be nonserious violations of the Act. He assessed penalties in the total amount of $5,335. Thereafter, pursuant to section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C.A. 651 *et seq.*, that decision was ordered to be reviewed by the Commission.

Having examined the record in its entirety, the Commission finds no prejudicial error therein.

Accordingly, it is ORDERED that the Judge's decision and order are hereby affirmed in all respects. □

MORAN, CHAIRMAN, dissenting: The record in this case not only does not establish a willful violation of the Act but clearly shows a misconception on the part of the Judge as to the kind and extent of the knowledge which must be shown to be in the possession of respondent in such cases.

Complainant cited respondent in this case for allegedly committing a willful violation of section 5(a)(2) of the Act because of its failure to comply with an occupational safety and health standard covering trench excavation. The citation resulted from investigation of the death of one of respondent's employees when a trench cave-in occurred on January 11, 1972.

The occupational safety and health standard at issue is published as 29 CFR 1926.652(b) and states as follows:

> Sides of trenches in unstable or soft material, five feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P–1, P–2.
>
> Table P–1: Approximate angle of repose for sloping of sides of excavations: solid rock, shale or cemented sand and gravels—90 Degrees. Compacted angular gravels—½ to 1. Average soils—1 to 1.

The evidence reveals that on November 23, 1971, nearly two months prior to the cave-in which is at issue in this case, respondent had employees engaged in digging a trench for the laying of an electrical conduit at the Evansdale Campus of West Virginia University. The trench wall had not been sloped or shored. Respondent's superintendent thought the material in which they were digging was composed of shale, a material requiring no sloping or support under the occupational safety and health standard quoted above. He reached this conclusion after reading the results of a soil analysis which had been undertaken at the direction of the prime contractor for this particular job. However, unbeknown to respondent, its superintendent had misread the chart, and the shale actually started one-half foot below the trench bottom. The trench walls were weathered shaley limestone of silty clay.

On the same day, an inspector from the State of West Virginia Labor Department visited respondent's worksite and advised that due to rainy weather and snow conditions, the ground was thoroughly wet and dangerous and ordered that the trench walls be sloped. This was accomplished. Subsequently, however, weather conditions improved and respondent returned to the digging of vertical trenches.

On January 11, 1972, respondent was still engaged in trenching operations at the University site. There had been a rainfall the previous night, and the collected rainwater had been pumped from the trench in the morning. A cave-in occurred that day while one of respondent's

employees was in the trench, causing his death. This citation for willful violation followed.

Since this is the first case of willful violation to come before this Commission for a decision on the merits, I believe it appropriate to set forth fully my understanding of the law on this subject. I regret that the other members of the Commission have not also done so.

At the outset, it is noted that the word "willful" is not defined in the Act. In fact, it is used only twice, once each in sections 17 (a) and (e). Section 17(a) provides that an employer:

> . . . who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of the Act, or regulations prescribed pursuant to the Act, may be assessed a civil penalty of not more than $10,000 for each violation.

Since the Act itself and the legislative history give no reference as to the meaning of the term, the common law background of the word must be examined to discover its usual meaning.

An examination of the case law reveals that the factors which distinguish a willful from a nonwillful act are knowledge and intent to commit a violation. See *Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139, 1142 (5th Cir. 1971); cf. *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F. 2d 532, 537 (2d Cir. 1965); *Goss* v. *Baltimore & O.R. Co.*, 355 F. 2d 649, 651 (3d Cir. 1966). In the *Coleman* case, the issue was civil liability under the Fair Labor Standards Act. The Fifth Circuit Court of Appeals held that "a willful act . . . [is] one deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally, or by ordinary negligence." *Id.*, *citing Nabab Oil Co.* v. *United States*, 190 F. 2d 478, 480 (10th Cir. 1951); *Browder* v. *United States*, 312 U.S. 335, 341 (1941). The employer's actions in *Coleman* were held to be willful because there was substantial evidence in the record to support a finding that he knew or suspected that his actions might violate the Act (485 F. 2d at 1142).

The Judge's decision in the case under review is based

upon the assumption that knowledge that one's conduct violates the Act is unimportant. He holds that as long as respondent dug the trench deliberately, he may be held liable for a willful violation of the Act. Although this is true in many fields of law, and especially so in criminal law, e.g., *United States* v. *Carter,* 311 F. 2d 934, 943 (6th Cir. 1963), it is not always the case.

Whether knowledge of the illegality of an action is an ingredient of a statutory offense depends upon the legislative intent, *Cohen* v. *United States,* 378 F. 2d 751 (9th Cir. 1967). In passing the Occupational Safety and Health Act, Congress intended that an employer would not be found liable for willful violation thereof unless he had actual knowledge that the conduct complained of constituted a violation. This is evident from the fact that willful violation was made a separate offense with an authorized civil penalty ten times greater than allowed for any other infraction.

The Act recognizes three categories of civil offenses of section 5:

(1) Willful or repeated (section 17(a)),
(2) Serious (sections 17 (b) and (k)),
(3) Not serious (section 17(c)).

To establish a violation of section 5 there need be proof only of a violation of the Act. No actual knowledge either of the Act's requirements or those of the standards promulgated pursuant thereto is necessary. Once this has been done, the penalty limitations contained in section 17(c) must be observed in the assessment of a penalty for the offense.

To establish that such a violation is serious, however, section 17(k) requires proof of a substantial probability that death or serious physical harm could result from a condition, practice, means, method, operation or process, and also that the employer *knew or should have known,* through the exercise of reasonable diligence, of the presence of the violation. For purposes of this section, the employer need not have actual knowledge that a violation is taking place. Constructive knowledge that a violation

has occurred is sufficient. Once such proof has been established, the penalty limitations contained in section 17(b) must be observed in the assessment of a penalty for the offense.

Willfulness, on the other hand, obviously implies something more, particularly since the authorized penalty can be ten times greater than that allowed for a "serious" violation.

It seems clear to me that in order for a violation to be willful, respondent must have actual knowledge of the fact that he is violating the requirements of the Act and, in a case such as this, the requirements of the occupational safety and health standard promulgated pursuant thereto with which he has allegedly failed to comply. In the absence of proof of such knowledge, the intent and purpose required by the ordinary definition of willfulness cannot be inferred. Only after such actual knowledge has been established may the penalty limits contained in section 17(a) be resorted to in the assessment of a penalty for such an offense.

Thus, an employer is not in willful violation of the Act unless he knows the requirements of the standards and knows he is not complying therewith. This is the only logical interpretation consistent with the provisions of the Act set forth above. If the sole requirement for a willful violation were that respondent intended to do the action complained of, then practically all violations of the Act would be willful and the penalty limitations so carefully and logically arranged in the Act would be virtually meaningless.

In this case, it is undisputed that respondent knew of the trenching requirements. A reproduction of the text of the standard published as 29 CFR 1926.652 had been included in safety plans submitted by respondent to the prime contractor. Substantial evidence that respondent knowingly violated the requirements of that standard, however, is not present in this record.

In his attempt to prove a willful violation in this case, complaint points to the fact that respondent had been

inspected by personnel from the West Virginia Department of Labor in November 1971 and had been warned at that time that the unsupported trench was hazardous. He claims that this indicates that respondent had knowledge of the hazardousness of the trench at the time it collapsed in January 1972. Respondent, on the other hand, argues that it relied on soil core samples analyzed for the prime contractor, which respondent's supervisor interpreted as showing a soil composition of shale, a soil type which, according to the requirements of the occupational safety and health standard at issue, needs no shoring or other supports.

Since there is no evidence thereof, and it is impossible to assume that the conditions which motivated the West Virginia inspector on November 23, 1971 also existed at the time of the accident on January 11, 1972 in a different area of the trenching operation, complainant's contention that the State inspector's action is adequate proof that respondent knew it was not complying with the requirements of the standard at the time of the trench cave-in is not substantiated. When the November inspection took place, the sides of the trench were wet throughout and in danger of collapsing. The order issued by the State as the result of this inspection merely states that the "*Present condition* of excavations . . . necessitates that immediate action be taken to correct trench hazards, which are extremely dangerous in their *present condition* . . ." [emphasis added].

The State order admonished respondent to support trench sides where they were in unstable or soft material, and to inspect the trench after every rainstorm or snowfall so that necessary precautions could be taken. These State procedures are the same as the requirements of the Federal occupational safety and health standard at issue in this case. However, the State citation was not such as to put respondent on notice that he had misinterpreted the results of the soil core boring samples. It merely said that the amount of rain which had recently fallen had left the trench walls weakened.

Although there was also some rain on the night before the January cave-in, there was no evidence that an inspection of the trench on the morning of the accident would have disclosed soil softened to the same degree as that found by the State inspector the previous November. Respondent's employees had pumped the rainwater out of the trench before beginning work. There was no evidence which disclosed a need for further precautionary measures. The note to Table P–1 of the trenching standards warns only that rain may change the composition of soil. It does not state that all trenches must be shored after a rainfall. Thus, there is no evidence to support the contention that respondent knew it had not complied with the standard.

It cannot be inferred simply from the fact of the cave-in, either that respondent's superintendent should have realized that his interpretation of the soil report was incorrect and that his conduct therefore exhibited a willful violation of the Act, or that his conduct constituted reckless disregard of whether he was in compliance. The misreading of the soil test report may have been deficient, but the fact that the superintendent could have ascertained the necessity for a greater angle of repose had he read the log correctly does not permit this Commission to impute actual knowledge and willfulness to his actions. Furthermore, since respondent's soil expert testified that the weathered shaley limestone which actually formed the walls of the trench was indistinguishable from shale, reckless disregard of danger cannot be imputed to the superintendent. He operated under a mistake of fact, rather than intentionally. He knew the requirements of the Act, but did not possess the requisite intent to violate them. Under the circumstances, willfulness by respondent in not complying with the occupational safety and health standard at issue in this case has not been established.

All of the factors which complainant advances to prove willfulness prove only that a serious violation existed. If respondent's supervisor had read the core sample chart correctly, he would have known that he was digging in

clay or silt containing only some shale, and that shoring or bracing was necessary. Respondent could, therefore, with the exercise of reasonable diligence, have known of the presence of the violation.

The evidence establishes all the requirements set forth in section 17(k) for proving a serious violation but not enough to prove a willful violation. The findings below should have been modified accordingly. □

APPENDIX D

DERN, JUDGE, OSAHRC: This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et seq.* (hereinafter referred to as the Act), to review citations of violations, willful, serious and non-serious, issued by the Secretary of Labor (hereinafter referred to as complainant), pursuant to section 9(a) of the Act, and proposed assessment of penalties in the amount of $8,535.00 upon such alleged violations pursuant to section 10(a) of the Act.

A citation for willful serious violation and a citation for serious violation were issued to respondent on March 22, 1972, the former alleging violation of 29 CFR 652(b), formerly section 1518.652(d) and the latter alleging violation of 29 CFR 1926.651(h) and 29 CFR 1926.652(h), formerly 29 CFR 1518.651(h) and 29 CFR 1518.652(h), respectively. A notification of proposed penalty was also issued on the same date proposing a penalty of $7,500 for the alleged violation of 29 CFR 652(b) and $800 for violation 29 CFR 1926.651(h). In the complaint, issued April 7, 1972, reference was made to alleged violations of 29 CFR 1926.651(h) and 29 CFR 1926.652(h) with combined proposed penalties for both violations of $800. A non-serious violation was also issued to respondent on March 22, 1972, alleging that it was in violation of five separate safety standards, namely 29 CFR 1926.401(f), 29 CFR 1926.150(c)(1)(vii), 29 CFR 1926.350(a)(1), 29 CFR

1926.51(c) and 29 CFR 1926.51(a)(1). The notification of proposed penalty issued March 22, 1972, proposed additional penalties of $235 on four of the five non-serious alleged violations.

On March 28, 1972, the respondent notified the complainant that it wished to contest the citations and proposed penalties. The complainant advised the Occupational Safety and Health Review Commission of the notice of contest. The case was assigned and opportunity for hearing pursuant to section 10(c) of the Act was afforded the respondent. The hearing was held June 27, 1972, in Morgantown, West Virginia. No additional parties desired to intervene in the proceedings. The respective parties were represented by counsel who filed briefs subsequent to the hearing.

Issues

The primary issue for consideration is whether there has been violations of the heretofore mentioned safety standards. If a violation of one or more standards occurred, a question arises as to whether there was a willful serious violation, or a serious violation within the criteria of section 17 (a), (b), and (k) of the Act. In addition, to the alleged serious violations, a determination must be made as to whether respondent committed non-serious violations of the cited standards. If respondent is adjudged to have been in violation of any of the standards as alleged, then a determination must be made as to whether the penalties proposed by complainant for each of the violations is appropriate.

Findings Of Fact

The evidence of record has been carefully considered and evaluated in its entirety. The facts hereinafter set forth are specifically determined in resolving the issues presented in this case.

1. Respondent, Frank Irey, Jr., Inc., is a Pennsylvania

corporation having a principal office at R.D. #2, Park Avenue Extension, Monongahela, Pennsylvania, and a worksite and place of employment at R.D. #2, Evansdale Campus, West Virginia University, Morgantown, West Virginia, where it is engaged in the business of general contracting (Ans. to Complaint; Stip., Tr. 10–11).

2. Respondent is engaged in various construction activities in Pennsylvania and West Virginia (Ans. to Complaint; Stip., Tr. 10–11).

3. Respondent regularly employs 160 employees in its said business (Stip., Tr. 10–11).

4. Respondent has a gross income of eight million dollars (Stip., Tr. 10–11).

5. On November 23, 1971, the respondent's worksite at the West Virginia University, Morgantown, West Virginia, was inspected by R. J. Jorishie, a field supervisor of the West Virginia Department of Labor, Division of Safety (Tr. 13–15). The respondent was at the time excavating a trench in which to lay an electric conduit (Tr. 143). The trench was approximately 15 feet deep, the sides of which were composed of a soft material (Tr. 16). There was an employee in the trench (Tr. 16). The sides of the trench were wet throughout and in danger of collapsing (Tr. 16, 17). Mr. Harley T. Six, respondent's project superintendent, was advised by Mr. Jorishie of the danger and instructed to either slope or shore the trench (Tr. 16, 17). Mr. Jorishie remained on the site while Mr. Six had the sides of the trench reduced and stepped back to an angle of repose (Tr. 17, 18). The reduction and sloping of the trench walls was accomplished by the use of a back hoe (Tr. 18, 63). Mr. Six believed the trench to have been dug in shale, but was told by Mr. Jorishie that it was hazardous (Tr. 141).

6. As a result of the November 23, 1971, inspection, Mr. Jorishie made and filed with the West Virginia Department of Labor, a Report on Safety Inspection (Ex. P–1, Tr. 19), a copy of which was sent to the respondent (Tr. 19). That report states that "Present condition of excavations at time of this inspection, necessitates that immediate

action be taken to correct trench hazards, which are extremely dangerous in their present condition, and which threaten the safety of the men working in the trenches." (Ex. P–1, P. 1). Page 2 of that report recommends to the respondent, "Sides of trenches in unstable or soft material (where applicable) shall be shored, braced, sloped or otherwise supported by means of sufficient strength to protect the employees working within them. . . . In lieu of shoring, the sides of the trench may be sloped to an angle of repose, to preclude possible collapse, . . ." (Ex. P–1).

7. Special Condition 16 to Boeing Contract #1, Morgantown Project, West Virginia University, Morgantown, West Virginia, (Ex. P–11) provides in part that contractors shall comply with the Safety and Health Regulations for construction (Title 29 CFR, Part 1518) and state and local codes and regulations. It also provides that "In the event of an apparent conflict or discrepancy between safety standards or requirements, the contractor shall comply with the more restrictive. Any such instance shall be reported to the Boeing Company." And, finally, it provides that "The Contractor shall prepare a Safety Plan describing how hazards to personnei will be controlled and how the Contractor's safety program will be implemented. The Contractor's Safety Plan must be submitted for approval to the Boeing Company within 10 calendar days following contract award" (Ex. P–11, S.C.–16.1, S.C.–16.1.2, S.C.–16.1. 3, S.C.–16.1.5, S.C.–16.2, P. 11).

8. On October 19, 1971, respondent submitted to the Boeing Company (hereinafter Boeing) pursuant to Special Condition 16, a safety plan "outlining the company's safety policy as per the 'Code of Federal Regulations,' Title 19, Part 1518 . . ." (Ex. P–8). The plan provides under the heading "Excavations, Trenching and Shoring" that "All slopes will be excavated to angle of repose," and that "All precautions necessary action will be taken in excavation, trenching and shoring" (Ex. P–8, p. 5–6).

9. On December 3, 1971, respondent submitted to Boeing another Safety Plan, also pursuant to Special Condi-

tion 16 (Ex. P–9). The "Company Safety Rules" set out in this safety plan provide in part:

26. Excavation, trenching and ditches must be sloped to the angle of repose, and flattened with varying soil conditions, except where solid rock allows for line drilling and presplitting.

28. Excavated or other material shall not be stored nearer than 4 feet from the edge of any excavation.

29. Banks more than 4 feet in height shall be shored or sloped to the angle of repose.

30. When employees are required to be in trenches 3 feet or more in depth, a ladder will be provided every 50' (laterally).

The plan also contains a reproduction from the Federal Register, Vol. 36, No. 75—Saturday, April 17, 1971, which sets out the "Approximate Angle of Repose for Sloping of Sides of Excavations."

Under the heading "Jobsite Safety Checklist," the plan contains the following at the heading "Excavations:"

1. Are trench banks layed back to a 3 to 1 slope?

5. Is a ladder in the trench?

10. On January 5, 1972, respondent submitted a third safety plan to Boeing, again pursuant to Special Condition 16 (Ex. P–10). That plan contained the same "company safety rules," reproduction of the "Approximate Angle of Repose" from the Federal Register and "Jobsite Safety Checklist" contained in the safety plan of December 3, 1971, as set out in paragraph 9 above.

11. On January 11, 1972, the respondent was thoroughly familiar with the requirements of the Act and the Standards with respect to the sloping and shoring of trenches and excavations.

12. On January 11, 1972, Fred Deal, an employee of respondent, died when the side of a trench being dug by respondent caved in and crushed him (Tr. 62, 63). The trench was approximately 7½ feet deep and 33 inches wide (Tr. 62, 63, 27, 29, 53, 72, 133, 147). The sides of the trench were not sloped or shored, but were vertical (Tr. 56, 62, 73, 74, 133). The trench was 46 feet in length (Tr. 71). The trench had no ladder in it (Tr. 63, 77), the only

means of ingress and egress provided being a ramp of back-fill material located at one end (Tr. 64, 65, 67, 134). The material used to backfill the trench was limestone chips (Tr. 154). Although it appears that the material which had been excavated from the trench prior to the accident had been carried away in tandem trucks (Tr. 66, 67), it also appears that there was material stored within 4 feet of the edge of the trench and along its entire length (Tr. 32, 33, 52, 55), and along both sides (Tr. 75). The material shown along side of the trench was material dug out to free the imprisoned employee (Tr. 66).

13. The trench in which Mr. Deal was killed on January 11, 1972, was located 75 to 100 feet from the trench being excavated on November 23, 1971, which Mr. Jorishie observed (Tr. 30). The trench of November 23, 1971, was described by Mr. Jorishie as being in soft material (Tr. 16, 17).

14. Mr. Six, who was in charge of the excavations of both November 23, 1971, and January 11, 1972 (Tr. 140, 141), testified as follows:

Q. On November 23, 1971, Mr. Six you said safety men visited your worksite and these men worked with the Department of Labor of the State of West Virginia?

A. That is correct.

Q. And you were digging a trench at that time?

A. For an electric conduit, yes, sir.

Q. Now the trench on November 23, 1971, was the same type of trench as what you were digging on January 11, 1972? (Tr. 143)

A. Do you mean the depth and width or similar?

Q. The same in general?

A. I would say yes.

Q. And you testified that the safety men told you on November 23, 1971, that the ditch was dangerous?

A. That is what they said. They said the rock would fall off on the top and fall down and hit a man, and I said: "That's no problem." I just put the hoe in there and pulled the top back and they stood there and watched me.

Q. On January 11, 1972, you were digging, then, the same type of ditch?

A. Similarly the same type of material.

Q. And you say that the type of material, or the type of earth, on January 11, 1972, was composed of shale?

A. That's what I thought, yes, sir. (Tr. 144).

15. In arriving at his conclusion that the trench of January 11, 1972, was dug in shale, Mr. Six stated that he relied on "Subsurface Exploration Logs" prepared by Frederic R. Harris, Inc. (Ex. R-A; Tr. 142, 144).

16. Dr. Javaie M. Alvi prepared a geologic section of the trench location of January 11, 1972, which purported to correlate the test borings reported in respondent's Exhibit A with Dr. Alvi's own test borings (Tr. 149–154; Ex. R-B).

17. Respondent's Exhibit B locates the bottom of the January 11, 1972, trench at an elevation of 1054.0 feet. When this elevation of the trench bottom is compared with the results of test boring number 107 (Ex. R-A, p. 2), upon which Mr. Six allegedly relied, it appears that the entire 7½ feet depth of the trench would be in soil described by Frederic R. Harris, Inc., as "Br. SILTY CLAY or CLAYEY SILT; Some weathered shale fragments; trace of fine sand and gravel or boulders. Boulder" (Emphasis that of Frederic R. Harris, Inc.). The portion of the report (Ex. R-A) interpreted by Mr. Six as indicating "Brown to dark brown weathered shale with silty clay seams," (Tr. 144) begins at an elevation of 1053.5 feet and extends downward 10 feet to elevation 1043.5. This description is that of an area which begins at a depth of 0.5 feet below the bottom of the trench excavated on January 11, 1972, and is in no way descriptive or indicative of the composition of the walls of the trench.

18. On January 10, 1972, the day prior to the accident resulting in the death of Mr. Deal, the trench had been excavated through solid rock, the excavation being accomplished by means of blasting. On January 11, 1972, the trenching was being accomplished by means of a backhoe, without the necessity of blasting (Tr. 137, 146, 147). It therefore appears that the material through which the trench was being excavated on January 11, 1972, was composed of substantially softer material than solid rock.

19. The material through which the trench was being excavated on January 11, 1972, was neither solid rock nor shale (Tr. 146, 154, 155, 160, 161).

20. Dr. Alvi described the material which he tested as "shaley limestone" (Tr. 154), "weathered limestone which contains humerus (humus) clay seams" (Tr. 155), and "weathered shaley limestone" (Tr. 161).

21. With respect to the cause of the slide, Dr. Alvi testified as follows:

> Q. Now what is your conclusion as to what caused the slide?
>
> A. In weathered limestone, it contains humerus (humus) clay seams and when it gets wet it decreases the span— shear strength—and the slides will take place. To make it a little more clear, during my experience of various jobs, I have noticed that a slide could have taken place, and it didn't take place on a half of one slope, a quarter of one slope . . .
>
> Q. In other words, you are saying that it is almost impossible to guard against this type of thing?
>
> A. No. You could guard against it by providing certain means but for trench purposes, which is a temporary excavation and not a permanent excavation, you are not going to do it. When you say 'guard against,' you have to think whether it is going to be of a long duration or of a short duration (Tr. 155).

22. The ground was wet around the excavations of both November 23, 1971, and January 11, 1972, due to rain (Tr. 16, 17, 70, 146, 147).

23. On January 11, 1972, the ground water which was then present wet the humus clay seams thereby weakening the shear strength of the material through which the trench had been dug, possibly producing the cave-in.

24. The respondent had been cautioned about the presence of ground water affecting its trenching operations by Mr. Jorishie, (Tr. 16, 17; Ex. P–1), and incorporated in two of its safety plans (Exc. P–9, P–10) The Note contained in the Table, "Approximate Angle of Repose," "Clay, Silts, Loams or Nonhomogenous Soils Require Shoring and Bracing. The presence of Ground Water Requires Special Treatment."

25. The cave-in of the trench establishes the fact that the

material in which the trench was being excavated was unstable.

26. When the sides of a trench are vertical, there is no angle of repose (Tr. 161).

27. There was no ladder in the trench (Tr. 63).

28. On January 13, 1972, respondent was using a two-wire connector extension cord lying on wet ground, which was used with a fuel pump (Tr. 44, 78).

29. On January 13, 1972, respondent, in the area of its storage trailer, had a fire extinguisher which had not been charged and had no record or tag showing it had been serviced (Tr. 79).

30. On January 13, 1972, at or near its storage trailer, respondent stored gas cylinders without valve protection caps on them (Tr. 82).

31. On January 13, 1972, respondent had provided only one toilet at its worksite (Tr. 82).

32. Respondent's maximum number of employees at its worksite was 37.

33. On January 13, 1972, respondent had not provided potable water for the employees at its worksite (Tr. 85).

Law and Opinion

The respondent contends that the Occupational Safety and Health Act of 1970, is unconstitutional in that it violates 4th, 5th, 6th and 7th Amendments of the United States Constitution. An administrative agency does not have jurisdiction to determine the constitutionality of a law. Certainly, the respondent who has raised the question of constitutionality of the Occupational Safety and Health Act is entitled to have that question resolved but only by a court of competent jurisdiction, not by the Review Commission. A Review Commission Judge's concern is whether there has been an adequate compliance with issued safety standards. It is understood the case is presently pending before the United States Supreme Court.

The Occupational Safety and Health Act was enacted by Congress on December 29, 1970, becoming effective as of April 28, 1971. Section 5(a)(2) of the Act provides:

Section 5(a) Each employer . . . shall comply with Occupational Safety and Health Standards promulgated under this Act.

ALLEGED VIOLATION OF 29 CFR 1926.652(b)

Section 1926.652(b), in pertinent part, provides as follows:

(b) Sides of trenches in unstable or soft material, five feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P–1, P–2 (following paragraph (g) of this section).

Table P–2 contains the following statement:

Shoring is not required in solid rock, hard shell, or hard slag.

The facts are undisputed that respondent, on January 11, 1972, was engaging in digging a trench which was approximately 7½ feet deep and 33 inches wide and that the sides of the trench were neither sloped nor shored but were vertical. The question presented is whether the soil in which the trench was being dug was of such composition that it would support the sides of the trench without shoring or bracing.

The trench in question is in excess of five feet, being 7½ feet in depth. Voluminous testimony was adduced regarding composition of the soil at the trench site. Mr. Jorishie, an inspector of the West Virginia Department of Labor, in November 1971, inspected the then worksite of respondent who was then engaging in digging a trench which was located approximately 75 to 100 feet from the trench in question, that is the one dug in January 1972, and although admitting he was not a soil expert, described the condition of the soil as soft material so that he concluded it was dangerous for anyone to be in the trench. He then stopped the work operation until a proper angle of repose was accomplished. On January 11, 1972, respondent was engaging in preparing the trench of the dimensions previously mentioned. Respondent's superintendent testified that he was of the opinion, relying on

information contained in subsurface exploration logs prepared by Frederic R. Harris, Inc. (Exhibit R–A) that the ground in which the trench was being dug was composed of shale. Therefore, he offered the opinion with such soil composition the angle of repose would be 90° as set forth in the standard. It would appear that respondent's superintendent either misconstrued or misunderstood the subsurface exploration logs since it is obvious that the information contained therein clearly indicates that the soil in which the trench was being dug, depth of 7½ feet, was described as "Br. SILTY CLAY, or CLAYEY SILT; Some weathered shale fragments; traces of fine sand and gravel or boulder" (Emphasis that of Frederic R. Harris, Inc.). The portion of the report (Exhibit R–A) interpreted by the superintendent as indicating "brown to dark brown weathered shale with silty clay seams" begins at an elevation of 1055.5 feet and extends downward 10 feet to elevation 1040.5. It appears that this description is that of an area which begins at a depth of 0.5 feet below the bottom of the trench excavated on January 11, 1972. This would not be indicative or descriptive of the composition of the walls of the trench.

Respondent's expert, Dr. Alvi, who made soil testings within the area where the trench was being excavated on January 10, 1972, accomplishing this testing June 14 and 15, 1972, described the soil he tested as "shaley limestone, weathered limestone which contains humus (clay seams)" and "weathered shaley limestone." Furthermore, Dr. Alvi stated that "in weathered limestone, it contains humus (clay seams) and when it gets wet it decreases and the spand—here strength—and slides will take place." The record further discloses that the ground was wet around the excavation January 10, 1972, on which date an employee of respondent was fatally injured, being crushed to death when the side of the trench caved in.

The respondent attributes the fatality to an "Act of God." This classification should not be accepted as an excuse for not taking proper precautions, i.e., shoring, sheeting, bracing or other means, to reduce the severity of a so-called "Act of God" occurrence.

The inescapable conclusion must be reached that respondent permitted an employee to work in a trench of a depth in excess of five feet with the sides of the trench composed of unstable material which sides were not supported by shoring, bracing, sheeting or sloping.

ALLEGED VIOLATIONS OF 29 CFR 1926.651(h) AND 1926.652(h)

Section 1926.651(h) provides that:

(h) Excavated or other material shall not be stored nearer than 4 feet from the edge of any excavation and shall be so stored and retained as to prevent its falling or sliding back into the excavation.

There is some conflict in the testimony regarding violation of this particular standard. It does appear, however, by the proponderance of the evidence that the excavated material was being moved from the vicinity of the trench as it was being excavated and that the material found stored on the side of the trench was excavated after the fatality and in order to free the imprisoned employee. Therefore, there is no violation of this standard.

Section 29 CFR 1926.652(h) provides:

(h) Where employees are required to be in trenches 3 feet deep or more, ladders, extending from the floor of the trench excavation to at least 3 feet above the top of the excavation shall be provided and so located as to provide means of exit without more than 25 feet of lateral travel.

The evidence is clear that no ladder was in the trench (Tr. 63) and that the trench was approximately 46 feet in length (Tr. 73). Therefore, it is perfectly obvious that there was a violation of the standard.

The complainant contends that there was a willful, serious violation as contemplated within section 17 (a) and (k) of the Act in reference to violation of 29 CFR 652(b). What is "willful" as set forth in section 17(a)? The Act does not define the word. The complainant, in his belief, sets forth several cases determined by the Federal Courts and the Supreme Court of the United States with reference to

the definition of the term "willful." The rule of broad or liberal construction to be given effect to the purposes of safety or remedial legislation has been applied by court's seeking to define the term "willful." *U.S.* v. *Illinois Central R. Company,* 303 U.S. 239 (1938); *Boston & M.R.R.* v. *U.S.,* 117 S. 2d 248 (C.A. 1, 1941); *Binkley Mining Co.* v. *Wheeler,* 133 F. 2d 863 (C.A. 3, 1943). the U.S. Circuit Court of Appeals, Fifth Circuit, May 17, 1972, 458 F. 2d, in the case of *Coleman* v. *Jiffy June Farms, Inc., James D. Hodgson, Secretary of Labor,* v. *Jiffy June Farms, Inc.,* pg. 1139, at page 1142 stated:

> Even under the criminal provisions of the Act (referring to the Fair Labor Standards Act) Section 216(a), a 'willful' act has been interpreted to mean no more than one 'deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally, or by ordinary negligence.'

Therefore, it would appear that a "willful" violation may exist under the Act where the evidence shows that the employer committed an intentional and knowing violation of the Act and the employer is conscious of the fact that what he is doing constitutes a violation of the Act, or even though the employer was not consciously violating the Act, he was aware that a hazardous condition existed and made no reasonable effort to eliminate the condition. Section 5 of the Act provides at subsection (a)(2) thereof:

> (a) Each employer . . . (2) Shall comply with the Occupational Safety and Health Standards promulgated under this Act.

Concomitant with duty, is the duty that the employer accurately inform himself before acting. In view of the nature of the act of trenching, and the likelihood of disasterous consequences, if such act is performed without informing oneself of the nature of the material through which the trenching is being performed, the respondent should have made itself fully aware of what it was doing before it proceeded with the trenching. Respondent, in effect, admits that he did not ascertain before hand the true nature of the soil which it was excavating, or that it

failed to either comprehend from the information it had what was the true composition of the material it was excavating. That failing constitutes a violation of section 5(a)(2). Furthermore, the respondent had been in November 1971, given a violation for trenching in approximately the same general area of the trenching of January 1972, when a fatality occurred, following a cave-in of the trench. With this knowledge and failure to acquaint itself with the full facts, a willful violation under section 17(a) of the Act must be concluded. Also, the evidence clearly shows that the respondent either had actual knowledge that the material in which it was excavating was unstable or had knowledge of facts indicating that it had not accurately informed itself of the nature of the soil. In the latter case, such knowledge, created a duty to investigate further. The respondent knew, or could have known with the exercise of only slight care and diligence that the material in which it was trenching was soft or unstable and its failure to slope or shore in face of such knowledge was willful.

Was there a serious violation of 29 CFR 1926.652(h)? This is a difficult question for definitely there was a violation of the standard for no ladder was in the trench on January 10, 1972. The Act, section 17(k) provides that a serious violation shall be deemed to exist in a place of employment if there is substantial probability that death or serious physical harm could result from a condition which exists. The fatality was caused by the cave-in of the sides of the trench and the fatality, in all probability, would have occurred whether there was a ladder in the trench or not. Therefore, it can only be concluded from the facts that while there was no ladder in the trench, which constituted a violation, it is a non-serious violation of the standard rather than a serious violation.

The record supports the contentions of the complaint that the respondent was in violation of Items 1 through 5 of the citation, that is, violations of standards 29 CFR 1926.401(f), 1926.150(c)(1)(vii), 1926.350(a)(1), 1926.51(c) and 1926.51(a)(1). All of these alleged violations, while

affecting safety and health, were not of a serious nature. The abatement dates as specified by the complaint, appear to be reasonable and proper.

Appropriateness of Penalties

Once a notice of contest is served, authority to assess civil penalties under the Act resides exclusively with the Commission. The Commission, in section 10(c) of the Act is charged with affirming, modifying or vacating citations issued by the Secretary under section 9(a) and penalties proposed by the Secretary under section 10(a) and 10(b). The Commission, by section 17(j) of the Act, is expressly required to find and give "due consideration" to the size of the employer's business, gravity of the violation, the good faith of the employer and history of previous violations in determining the assessment of an appropriate penalty.

The Acting Area Director testified regarding the methodology used in arriving at the proposed penalties stating that no credit was given respondent for size of its business in as much as respondent employed over 100 employees; that no credit was given for good faith because of failure to demonstrate an effective safety program, and apparently, more or less arbitrarily, assessed a penalty of $7500 for willful serious violation and penalty of $800 for serious violation. Consideration of 20 per cent for history was accorded respondent in assessing penalties for the non-serious violations. In *Nacirema Operating Co., Inc.*, OSHRC Docket No. 4, the Commission indicated that the principal factor to be considered in assessing an appropriate penalty for a violation is the gravity of the offense.

In the instant case, a death occurred apparently because of failure of respondent to comply with standard 29 CFR 1926.652(b) for if the trench had been shored, braced or appropriately sloped, the cave-in would not have occurred. The gravity of the offense is severe and with the additional factor that respondent, even though not consciously violated the Act, was aware that a hazardous con-

dition existed and made no reasonable effort to eliminate the condition, the further conclusion must be reached that there was a willful violation of the Act. Section 17(a) of the Act provides for an assessment of a civil penalty of not more than $10,000 for each willful violation. After due consideration of the four criteria provided by section 17(j) of the Act, it is concluded that a penalty of $5,000 for violation of 29 CFR 1926.652(b) is appropriate. The violation of 29 CFR 1926.652(h) is considered to be other than serious as defined in section 17(k), therefore a penalty of $100 is deemed reasonable and appropriate. Penalties of $80, $45, $55 and $55 and $55 for violations of 29 CFR 1926.401(f), 1926.350(a)(1), 1926.51(c) and 1926.51(a)(1), respectively, are reasonable and appropriate.

Conclusions of Law

1. At all times mentioned herein respondent was and is an employer engaged in a business affecting commerce within the meaning of section 3 of the Act and the Commission has jurisdiction of the parties and the subject matter herein.

2. Pursuant to section 6(a) of the Act, the Secretary of Labor, on April 27, 1971, adopted 29 CFR 1926 (formerly 29 CFR 1518) to become effective generally on August 27, 1971. The standards alleged to be violated in complainant's complaint and citation were, therefore, in full force and effect as regards respondent and its employees on November 23, 1971, and January 11, 1972.

3. Respondent was, on November 23, 1971, and January 11 and 13, 1972, and at all other times mentioned herein, an employer subject to the aforesaid safety and health standards promulgated as 29 CFR 1926 (formerly 29 CFR 1518), by the Secretary of Labor.

4. Complainant's complaint alleges a willful violation of section 5(a)(2) of the Act and the standard at 29 CFR 1926.652(b).

5. Section 652(b) of 29 CFR provides:

(b) Sides of trenches in unstable or soft material, five feet or more in depth, shall be shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P–1, P–2 [following paragraph (9) of this section].

6. On January 11, 1972, respondent violated section 1926.652(b) of 29 CFR in that it failed to shore, sheet, brace, slope or otherwise support by means of sufficient strength the sides of a trench 7½ feet deep which had been dug in soft or unstable material.

7. The violation of section 5(a)(2) of the Act and the standard at 29 CFR 1926.652(b) was a willful violation of the Act within the meaning of section 17(a) of the Act, inasmuch as the respondent was aware of the Act and the standards applicable to it, was particularly familiar with the requirements of 29 CFR 1926.651(b), was or should have been aware that the material in which it was trenching was soft or unstable and knew that the presence of ground water would render excavation without sloping or shoring more hazardous.

8. The complainant's complaint alleges a serious violation of section 5(a)(2) of the Act and the standards at 29 CFR 1926.651(h) and 1926.652(h).

9. Section 29 CFR 1926.651(h) provides that:

(h) Excavated or other material shall not be stored nearer than 4 feet from the edge of any excavation and shall be so stored and retained as to prevent its falling or sliding back in to the excavation.

10. On January 11, 1972, the respondent was not in violation of the standard 29 CFR 1926.651(h), since the stored material within 4 feet of the edge of its trench was placed after the fatality.

11. Section 29 CFR 1926.652(h) provides:

(h) Where employees are required to be in trenches 3 feet deep or more, ladders, extending from the floor of the trench excavation to at least 3 feet above the top of the excavation, shall be provided and so located as to provide means of exit without more than 25 feet of lateral travel.

12. On January 11, 1972, the respondent was in violation of the standard at 29 CFR 1926.652(h) in that it required an employee to be in a trench 7½ feet deep and 46 feet long without providing a ladder in said trench.

13. Section 17(k) of the Act provides:

(k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

14. The violation found in paragraph 6 was serious within the meaning of section 17(k) in that there was a substantial probability that death or serious physical harm could result from the condition existing in and around respondent's trench and respondent knew of the presence of the violations.

15. The violation found in paragraph 12 was other than serious as defined by section 17(k) of the Act, but did affect safety and health as defined within the Act.

16. The complainant's complaint, as amended, alleges that on January 13, 1972, the respondent violated section 5(a)(2) of the Act and the Standards at 29 CFR 1926.401(f), 29 CFR 1926.150(c)(1)(vii), 29 CFR 1926.350(a)(1), 29 CFR 1926.51(c) and 29 CFR 1926.51(a)(1).

17. The standards set out in paragraph 15 above provide as follows:

(a) 29 CFR 1926.401(f): Extension cords. Extension cords used with portable electric tools and appliances shall be of three-wire type.

(b) 29 CFR 1926.150(c)(1)(vii): Portable fire extinguishers shall be inspected periodically and maintained in accordance with Maintenance and Use of Portable Fire Extinguishers, NFPA No. 10A-1970.

(c) 29 CFR 1926.350(a)(1): Transportation, moving, and

storing compressed gas cylinders. (1) Valve protection caps shall be in place and secured.

(d) 29 CFR 1926.51(c): Toilets at construction job sites. (1) Toilets shall be provided for employees according to the following table:

TABLE D–1

	Minimum number of facilities
20 or less	1.
20 or more	1 toilet seat and 1 urinal per 40 workers.
200 or more	1 toilet seat and 1 urinal per 50 workers

(e) 29 CFR 1926.51(a)(1): An adequate supply of potable water shall be provided in all places of employment.

18. On January 13, 1972, the respondent violated the following standards:

(a) 29 CFR 1926.401(f), in that it used an extension cord of the two-connector type with a fuel pump.

(b) 29 CFR 1926.150(c)(1)(vii), in that it had a fire extinguisher which had no inspection tag or record on it.

(c) 29 CFR 1926.350(a)(1), in that it stored gas cylinders without valve protection caps on them.

(d) 29 CFR 1926.51(c), in that it provided only one toilet for 37 employees.

(e) 29 CFR 1926.51(a)(1), in that it failed to provide a supply of potable drinking water for its employees.

19. The violations found in paragraph 18 above were other than serious as defined by section 17(k) of the Act.

20. Section 17(a) of the Act provides:

(a) Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule or other promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $10,000 for each violation.

20. Section 17(b) of the Act provides:

(b) Any employer who has received a citation for a serious violation of the requirements of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act,

shall be assessed a civil penalty of up to $1000 for each such violation.

21. Section 17(c) of the Act provides:

(c) Any employer who has received a citation for a violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of regulations prescribed pursuant to this Act, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $1000 for each such violation.

22. Authority to assess civil penalties is exclusively vested in the Commission, (*Hodgson* v. *Nacirema Operating Company*, OSHRC Docket No. 4; Section 17(j)), and in assessing penalties the Commission is to give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations" (Section 17(j)).

24. The penalty of $5,335 is, under the circumstances herein presented, appropriate and reasonable.

ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record, it is

ORDERED:

1. That the respondent was in violation of 29 CFR 1926.652(b); that the violation was a willful serious violation and is liable for a penalty of $5,000.

2. That the respondent was in violation of 29 CFR 1926.652(h), the violation being of a nonserious nature, and is liable for a penalty of $100.00.

3. That the respondent was in violation of 29 CFR 1926.401(f), 1926.150(c)(1)(vii), 1926.350(a)(1), 1926.51(c) and 1926.51(a)(1), and the violations are of a non-serious nature as alleged.

4. That the respondent is liable for penalties of $80 for violation of 29 CFR 1926.401(f), for $45 for violation of

29 CFR 1926.350(a)(1), for $55 for violation of 29 CFR 1926.51(c) and for $55 for violation of 29 CFR 1926.51(a)(1).

5. The respondent was not in violation of 29 CFR 1926.651(h). Therefore, the charge in Citation No. 2 and the proposed penalty are vacated. □

APPENDIX E

Public Law 91-596
91st Congress, S. 2193
December 29, 1970

An Act

84 STAT. 1590

To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Occupational Safety and Health Act of 1970".

Occupational Safety and Health Act of 1970.

CONGRESSIONAL FINDINGS AND PURPOSE

SEC. (2) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) The term "Secretary" mean the Secretary of Labor.

(2) The term "Commission" means the Occupational Safety and Health Review Commission established under this Act.

(3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof.

(4) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

(6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

(7) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

(9) The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1), has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested

and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

(10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act.

(11) The term "Committee" means the National Advisory Committee on Occupational Safety and Health established under this Act.

(12) The term "Director" means the Director of the National Institute for Occupational Safety and Health.

(13) The term "Institute" means the National Institute for Occupational Safety and Health established under this Act.

(14) The term "Workmen's Compensation Commission" means the National Commission on State Workmen's Compensation Laws established under this Act.

APPLICABILITY OF THIS ACT

SEC. 4. (a) This Act shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone. The Secretary of the Interior shall, by regulation, provide for judicial enforcement of this Act by the courts established for areas in which there are no United States district courts having jurisdiction. 67 Stat. 462. 43 USC 1331 note.

(b)(1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. 73 Stat. 688.

(2) The safety and health standards promulgated under the Act of June 30, 1936, commonly known as the Walsh-Healey Act (41 U.S.C. 35 et seq.), the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), Public Law 91-54, Act of August 9, 1969 (40 U.S.C. 333), Public Law 85-742, Act of August 23, 1958 (33 U.S.C. 941), and the National Foundation on Arts and Humanities Act (20 U.S.C. 951 et seq.) are superseded on the effective date of corresponding standards, promulgated under this Act, which are determined by the Secretary to be more effective. Standards issued under the laws listed in this paragraph and in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts. 49 Stat. 2036. 79 Stat. 1034. 83 Stat. 96. 72 Stat. 835. 79 Stat. 845; Ante, p. 443.

(3) The Secretary shall, within three years after the effective date of this Act, report to the Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other Federal laws. Report to Congress.

(4) Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

DUTIES

SEC. 5. (a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

OCCUPATIONAL SAFETY AND HEALTH STANDARDS

SEC. 6. (a) Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

80 Stat. 381; 81 Stat. 195. 5 USC 500.

(b) The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health, Education, and Welfare, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this Act, the Secretary may request the recommendations of an advisory committee appointed under section 7 of this Act. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health, Education, and Welfare, together with all pertinent factual information developed by the Secretary or the Secretary of Health, Education, and Welfare, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

Advisory committee, recommendations.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission. Publication in Federal Register.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing. Hearing, notice. Publication in Federal Register.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired. Toxic materials.

(6)(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as Temporary variance order.

practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

Notice, hearing.

Renewal.

Time limitation.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health, Education, and Welfare certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health, Education, and Welfare designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

Labels, etc.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

Protective equipment, etc.

Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In

addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health, Education, and Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education, and Welfare. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health, Education, and Welfare, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health, Education, and Welfare, may by rule promulgated pursuant to section 553 of title 5, United States Code, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

Medical examinations.

80 Stat. 383.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard.

Publication in Federal Register.

(c)(1) The Secretary shall provide, without regard to the requirements of chapter 5, title 5, United States Code, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

Temporary standard. Publication in Federal Register. 80 Stat. 381; 81 Stat. 195. 5 USC 500.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

Time limitation.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with section 6(b) of this Act, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they

Variance rule.

differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

Publication in Federal Register.

(e) Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this Act, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

Petition for judicial review.

(f) Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health, Education, and Welfare regarding the need for mandatory standards in determining the priority for establishing such standards.

ADVISORY COMMITTEES; ADMINISTRATION

Establishment; membership.

SEC. 7. (a)(1) There is hereby established a National Advisory Committee on Occupational Safety and Health consisting of twelve members appointed by the Secretary, four of whom are to be designated by the Secretary of Health, Education, and Welfare, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and composed of representatives of manangement, labor, occupational safety and occupational health professions, and of the public. The Secretary shall designate one of the public members as Chairman. The members shall be selected upon the basis of their experience and competence in the field of occupational safety and health.

80 Stat. 378, 5 USC 101.

(2) The Committee shall advise, consult with, and make recommendations to the Secretary and the Secretary of Health, Education, and Welfare on matters relating to the administration of the Act. The Committee shall hold no fewer than two meetings during each calendar year. All meetings of the Committee shall be open to the public and a transcript shall be kept and made available for public inspection.

Public transcript.

(3) The members of the Committee shall be compensated in accordance with the provisions of section 3109 of title 5, United States Code.

80 Stat. 416.

(4) The Secretary shall furnish to the Committee an executive secretary and such secretarial, clerical, and other services as are deemed necessary to the conduct of its business.

(b) An advisory committee may be appointed by the Secretary to assist him in his standard-setting functions under section 6 of this Act. Each such committee shall consist of not more than fifteen members

and shall include as a member one or more designees of the Secretary of Health, Education, and Welfare, and shall include among its members an equal number of persons qualified by experience and affiliation to present the viewpoint of the employers involved, and of persons similarly qualified to present the viewpoint of the workers involved, as well as one or more representatives of health and safety agencies of the States. An advisory committee may also include such other persons as the Secretary may appoint who are qualified by knowledge and experience to make a useful contribution to the work of such committee, including one or more representatives of professional organizations of technicians or professionals specializing in occupational safety or health, and one or more representatives of nationally recognized standards-producing organizations, but the number of persons so appointed to any such advisory committee shall not exceed the number appointed to such committee as representatives of Federal and State agencies. Persons appointed to advisory committees from private life shall be compensated in the same manner as consultants or experts under section 3109 of title 5, United States Code. The Secretary shall pay to any State which is the employer of a member of such a committee who is a representative of the health or safety agency of that State, reimbursement sufficient to cover the actual cost to the State resulting from such representative's membership on such committee. Any meeting of such committee shall be open to the public and an accurate record shall be kept and made available to the public. No member of such committee (other than representatives of employers and employees) shall have an economic interest in any proposed rule.

80 Stat. 416.

Recordkeeping.

(c) In carrying out his responsibilities under this Act, the Secretary is authorized to—

(1) use, with the consent of any Federal agency, the services, facilities, and personnel of such agency, with or without reimbursement, and with the consent of any State or political subdivision thereof, accept and use the services, facilities, and personnel of any agency of such State or subdivision with reimbursement; and

(2) employ experts and consultants or organizations thereof as authorized by section 3109 of title 5, United States Code, except that contracts for such employment may be renewed annually; compensate individuals so employed at rates not in excess of the rate specified at the time of service for grade GS-18 under section 5332 of title 5, United States Code, including traveltime, and allow them while away from their homes or regular places of business, travel expenses (including per diem in lieu of subsistence) as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently, while so employed.

Ante, p. 138-1.

80 Stat. 499; 83 Stat. 190.

INSPECTIONS, INVESTIGATIONS, AND RECORDKEEPING

SEC. 8. (a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Subpoena power.

(b) In making his inspections and investigations under this Act the Secretary may require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of a contumacy, failure, or refusal of any person to obey such an order, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides or transacts business, upon the application by the Secretary, shall have jurisdiction to issue to such person an order requiring such person to appear to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Recordkeeping.

(c)(1) Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health, Education, and Welfare, such records regarding his activities relating to this Act as the Secretary, in cooperation with the Secretary of Health, Education, and Welfare, may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this paragraph such regulations may include provisions requiring employers to conduct periodic inspections. The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act, including the provisions of applicable standards.

Work-related deaths, etc.; reports.

(2) The Secretary, in cooperation with the Secretary of Health, Education, and Welfare, shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(3) The Secretary, in cooperation with the Secretary of Health, Education, and Welfare, shall issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under section 6. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable occupational safety and health standard promulgated under section 6, and shall inform any employee who is being thus exposed of the corrective action being taken.

(d) Any information obtained by the Secretary, the Secretary of Health, Education, and Welfare, or a State agency under this Act shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible.

(e) Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

(f)(1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

(2) Prior to or during any inspection of a workplace, any employees or representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which they have reason to believe exists in such workplace. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation and shall furnish the employees or representative of employees requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

(g)(1) The Secretary and Secretary of Health, Education, and Welfare are authorized to compile, analyze, and publish, either in summary or detailed form, all reports or information obtained under this section. Reports, publication.

(2) The Secretary and the Secretary of Health, Education, and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment. Rules and regulations.

CITATIONS

SEC. 9. (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

(b) Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.

Limitation.

(c) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

PROCEDURE FOR ENFORCEMENT

SEC. 10. (a) If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 17 by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 9(a) or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days

of the issuance of a citation under section 9(a), any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

80 Stat. 384.

JUDICIAL REVIEW

SEC. 11. (a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 10 may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evi-

72 Stat. 941; 80 Stat. 1323.

dence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28, 62 Stat. 928. United States Code. Petitions filed under this subsection shall be heard expeditiously.

(b) The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a), is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 10, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 17, in addition to invoking any other available remedies.

(c) (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.

THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Establishment; membership.

SEC. 12. (a) The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason

of training, education, or experience are qualified to carry out the functions of the Commission under this Act. The President shall designate one of the members of the Commission to serve as Chairman.

(b) The terms of members of the Commission shall be six years except that (1) the members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years, and (2) a vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term. A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Terms.

(c)(1) Section 5314 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph: 80 Stat. 460.

"(57) Chairman, Occupational Safety and Health Review Commission."

(2) Section 5315 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph: Ante, p. 776.

"(94) Members, Occupational Safety and Health Review Commission."

(d) The principal office of the Commission shall be in the District of Columbia. Whenever the Commission deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, it may hold hearings or conduct other proceedings at any other place. Location.

(e) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such hearing examiners and other employees as he deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: *Provided*, That assignment, removal and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code. 5 USC 5101, 5331. Ante, p. 198-1.

(f) For the purpose of carrying out its functions under this Act, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members. Quorum.

(g) Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure. Public records. 28 USC app.

(h) The Commission may order testimony to be taken by deposition in any proceedings pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) For the purpose of any proceeding before the Commission, the provisions of section 11 of the National Labor Relations Act (29 U.S.C. 161) are hereby made applicable to the jurisdiction and powers of the Commission. 61 Stat. 150; Ante, p. 930.

Report.

(j) A hearing examiner appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such hearing examiner by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the hearing examiner shall become the final order of the Commission within thirty days after such report by the hearing examiner, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

(k) Except as otherwise provided in this Act, the hearing examiners shall be subject to the laws governing employees in the classified civil service, except that appointments shall be made without regard to

80 Stat. 453.

section 5108 of title 5, United States Code. Each hearing examiner shall receive compensation at a rate not less than that prescribed for

Ante, p. 198-1.

GS-16 under section 5332 of title 5, United States Code.

PROCEDURES TO COUNTERACT IMMINENT DANGERS

SEC. 13. (a) The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

(b) Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to this Act. The proceeding shall be as provided by Rule 65 of the Fed-

28 USC app.

eral Rules, Civil Procedure, except that no temporary restraining order issued without notice shall be effective for a period longer than five days.

(c) Whenever and as soon as an inspector concludes that conditions or practices described in subsection (a) exist in any place of employment, he shall inform the affected employees and employers of the danger and that he is recommending to the Secretary that relief be sought.

(d) If the Secretary arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employees, might bring an action against the Secretary in the United States district court for the district in which the imminent danger is alleged to exist or the employer has its principal office, or for the District of Columbia, for a writ of mandamus to compel the Secretary to seek such an order and for such further relief as may be appropriate.

REPRESENTATION IN CIVIL LITIGATION

SEC. 14. Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this Act but all such litigation shall be subject to the direction and control of the Attorney General. 80 Stat. 613.

CONFIDENTIALITY OF TRADE SECRETS

SEC. 15. All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceeding under this Act which contains or which might reveal a trade secret referred to in section 1905 of title 18 of the United States Code shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this Act or when relevant in any proceeding under this Act. In any such proceeding the Secretary, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. 62 Stat. 791.

VARIATIONS, TOLERANCES, AND EXEMPTIONS

SEC. 16. The Secretary, on the record, after notice and opportunity for a hearing may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper to avoid serious impairment of the national defense. Such action shall not be in effect for more than six months without notification to affected employees and an opportunity being afforded for a hearing.

PENALTIES

SEC. 17. (a) Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $10,000 for each violation.

(b) Any employer who has received a citation for a serious violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, shall be assessed a civil penalty of up to $1,000 for each such violation.

(c) Any employer who has received a citation for a violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of regulations prescribed pursuant to this Act, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $1,000 for each such violation.

(d) Any employer who fails to correct a violation for which a citation has been issued under section 9(a) within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 10 initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $1,000 for each day during which such failure or violation continues.

(e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Any person who gives advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

65 Stat. 721; 79 Stat. 234.

(h)(1) Section 1114 of title 18, United States Code, is hereby amended by striking out "designated by the Secretary of Health, Education, and Welfare to conduct investigations, or inspections under the Federal Food, Drug, and Cosmetic Act" and inserting in lieu thereof "or of the Department of Labor assigned to perform investigative, inspection, or law enforcement functions".

62 Stat. 756.

(2) Notwithstanding the provisions of sections 1111 and 1114 of title 18, United States Code, whoever, in violation of the provisions of section 1114 of such title, kills a person while engaged in or on account of the performance of investigative, inspection, or law enforcement functions added to such section 1114 by paragraph (1) of this subsection, and who would otherwise be subject to the penalty provisions of such section 1111, shall be punished by imprisonment for any term of years or for life.

(i) Any employer who violates any of the posting requirements, as prescribed under the provisions of this Act, shall be assessed a civil penalty of up to $1,000 for each violation.

(j) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(l) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.

STATE JURISDICTION AND STATE PLANS

SEC. 18. (a) Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.

(c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6 which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to the Act which is at least as effective as that provided in section 8, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

(d) If the Secretary rejects a plan submitted under subsection (b), he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing. Notice of hearing.

(e) After the Secretary approves a State plan submitted under subsection (b), he may, but shall not be required to, exercise his authority under sections 8, 9, 10, 13, and 17 with respect to comparable standards promulgated under section 6, for the period specified in the next sentence. The Secretary may exercise the authority referred to above until he determines, on the basis of actual operations under the

State plan, that the criteria set forth in subsection (c) are being applied, but he shall not make such determination for at least three years after the plan's approval under subsection (c). Upon making the determination referred to in the preceding sentence, the provisions of sections 5(a)(2), 8 (except for the purpose of carrying out subsection (f) of this section), 9, 10, 13, and 17, and standards promulgated under section 6 of this Act, shall not apply with respect to any occupational safety or health issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 9 or 10 before the date of determination.

Continuing evaluation.

(f) The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

Plan rejection, review.

(g) The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of title 28, United States Code. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

72 Stat. 941; 80 Stat. 1323.

62 Stat. 928.

(h) The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from the date of enactment of this Act, whichever is earlier.

FEDERAL AGENCY SAFETY PROGRAMS AND RESPONSIBILITIES

SEC. 19. (a) It shall be the responsibility of the head of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 6. The head of each agency shall (after consultation with representatives of the employees thereof)—

(1) provide safe and healthful places and conditions of employment, consistent with the standards set under section 6;

(2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees;

(3) keep adequate records of all occupational accidents and illnesses for proper evaluation and necessary corrective action; Recordkeeping.

(4) consult with the Secretary with regard to the adequacy as to form and content of records kept pursuant to subsection (a)(3) of this section; and

(5) make an annual report to the Secretary with respect to occupational accidents and injuries and the agency's program under this section. Such report shall include any report submitted under section 7902(e)(2) of title 5, United States Code. Annual report. 80 Stat. 530.

(b) The Secretary shall report to the President a summary or digest of reports submitted to him under subsection (a)(5) of this section, together with his evaluations of and recommendations derived from such reports. The President shall transmit annually to the Senate and the House of Representatives a report of the activities of Federal agencies under this section. Report to President. Report to Congress.

(c) Section 7902(c)(1) of title 5, United States Code, is amended by inserting after "agencies" the following: "and of labor organizations representing employees".

(d) The Secretary shall have access to records and reports kept and filed by Federal agencies pursuant to subsections (a)(3) and (5) of this section unless those records and reports are specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy, in which case the Secretary shall have access to such information as will not jeopardize national defense or foreign policy. Records, etc.; availability.

RESEARCH AND RELATED ACTIVITIES

SEC. 20. (a)(1) The Secretary of Health, Education, and Welfare, after consultation with the Secretary and with other appropriate Federal departments or agencies, shall conduct (directly or by grants or contracts) research, experiments, and demonstrations relating to occupational safety and health, including studies of psychological factors involved, and relating to innovative methods, techniques, and approaches for dealing with occupational safety and health problems.

(2) The Secretary of Health, Education, and Welfare shall from time to time consult with the Secretary in order to develop specific plans for such research, demonstrations, and experiments as are necessary to produce criteria, including criteria identifying toxic substances, enabling the Secretary to meet his responsibility for the formulation of safety and health standards under this Act; and the Secretary of Health, Education, and Welfare, on the basis of such research, demonstrations, and experiments and any other information available to him, shall develop and publish at least annually such criteria as will effectuate the purposes of this Act.

(3) The Secretary of Health, Education, and Welfare, on the basis of such research, demonstrations, and experiments, and any other information available to him, shall develop criteria dealing with toxic materials and harmful physical agents and substances which will describe exposure levels that are safe for various periods of employment, including but not limited to the exposure levels at which no employee will suffer impaired health or functional capacities or diminished life expectancy as a result of his work experience.

(4) The Secretary of Health, Education, and Welfare shall also conduct special research, experiments, and demonstrations relating to occupational safety and health as are necessary to explore new problems, including those created by new technology in occupational safety and health, which may require ameliorative action beyond that

which is otherwise provided for in the operating provisions of this Act. The Secretary of Health, Education, and Welfare shall also conduct research into the motivational and behavioral factors relating to the field of occupational safety and health.

Toxic substances, records.

(5) The Secretary of Health, Education, and Welfare, in order to comply with his responsibilities under paragraph (2), and in order to develop needed information regarding potentially toxic substances or harmful physical agents, may prescribe regulations requiring employers to measure, record, and make reports on the exposure of employees to substances or physical agents which the Secretary of Health, Education, and Welfare reasonably believes may endanger the health or safety of employees. The Secretary of Health, Education, and Welfare also is authorized to establish such programs of medical examinations and tests as may be necessary for determining the incidence of occupational illnesses and the susceptibility of employees to such illnesses. Nothing in this or any other provision of this Act shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others. Upon the request of any employer who is required to measure and record exposure of employees to substances or physical agents as provided under this subsection, the Secretary of Health, Education, and Welfare shall furnish full financial or other assistance to such employer for the purpose of defraying any additional expense incurred by him in carrying out the measuring and recording as provided in this subsection.

Medical examinations.

Toxic substances, publication.

(6) The Secretary of Health, Education, and Welfare shall publish within six months of enactment of this Act and thereafter as needed but at least annually a list of all known toxic substances by generic family or other useful grouping, and the concentrations at which such toxicity is known to occur. He shall determine following a written request by any employer or authorized representative of employees, specifying with reasonable particularity the grounds on which the request is made, whether any substance normally found in the place of employment has potentially toxic effects in such concentrations as used or found; and shall submit such determination both to employers and affected employees as soon as possible. If the Secretary of Health, Education, and Welfare determines that any substance is potentially toxic at the concentrations in which it is used or found in a place of employment, and such substance is not covered by an occupational safety or health standard promulgated under section 6, the Secretary of Health, Education, and Welfare shall immediately submit such determination to the Secretary, together with all pertinent criteria.

Annual studies.

(7) Within two years of enactment of this Act, and annually thereafter the Secretary of Health, Education, and Welfare shall conduct and publish industrywide studies of the effect of chronic or low-level exposure to industrial materials, processes, and stresses on the potential for illness, disease, or loss of functional capacity in aging adults.

Inspections.

(b) The Secretary of Health, Education, and Welfare is authorized to make inspections and question employers and employees as provided in section 8 of this Act in order to carry out his functions and responsibilities under this section.

Contract authority.

(c) The Secretary is authorized to enter into contracts, agreements, or other arrangements with appropriate public agencies or private organizations for the purpose of conducting studies relating to his responsibilities under this Act. In carrying out his responsibilities

under this subsection, the Secretary shall cooperate with the Secretary of Health, Education, and Welfare in order to avoid any duplication of efforts under this section.

(d) Information obtained by the Secretary and the Secretary of Health, Education, and Welfare under this section shall be disseminated by the Secretary to employers and employees and organizations thereof.

(e) The functions of the Secretary of Health, Education, and Welfare under this Act shall, to the extent feasible, be delegated to the Director of the National Institute for Occupational Safety and Health established by section 22 of this Act. Delegation of functions.

TRAINING AND EMPLOYEE EDUCATION

SEC. 21. (a) The Secretary of Health, Education, and Welfare, after consultation with the Secretary and with other appropriate Federal departments and agencies, shall conduct, directly or by grants or contracts (1) education programs to provide an adequate supply of qualified personnel to carry out the purposes of this Act, and (2) informational programs on the importance of and proper use of adequate safety and health equipment.

(b) The Secretary is also authorized to conduct, directly or by grants or contracts, short-term training of personnel engaged in work related to his responsibilities under this Act.

(c) The Secretary, in consultation with the Secretary of Health, Education, and Welfare, shall (1) provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe or unhealthful working conditions in employments covered by this Act, and (2) consult with and advise employers and employees, and organizations representing employers and employees as to effective means of preventing occupational injuries and illnesses.

NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH

SEC. 22. (a) It is the purpose of this section to establish a National Institute for Occupational Safety and Health in the Department of Health, Education, and Welfare in order to carry out the policy set forth in section 2 of this Act and to perform the functions of the Secretary of Health, Education, and Welfare under sections 20 and 21 of this Act. Establishment.

(b) There is hereby established in the Department of Health, Education, and Welfare a National Institute for Occupational Safety and Health. The Institute shall be headed by a Director who shall be appointed by the Secretary of Health, Education, and Welfare, and who shall serve for a term of six years unless previously removed by the Secretary of Health, Education, and Welfare. Director, appointment, term.

(c) The Institute is authorized to—

(1) develop and establish recommended occupational safety and health standards; and

(2) perform all functions of the Secretary of Health, Education, and Welfare under sections 20 and 21 of this Act.

(d) Upon his own initiative, or upon the request of the Secretary or the Secretary of Health, Education, and Welfare, the Director is authorized (1) to conduct such research and experimental programs as he determines are necessary for the development of criteria for new and improved occupational safety and health standards, and (2) after

consideration of the results of such research and experimental programs make recommendations concerning new or improved occupational safety and health standards. Any occupational safety and health standard recommended pursuant to this section shall immediately be forwarded to the Secretary of Labor, and to the Secretary of Health, Education, and Welfare.

(e) In addition to any authority vested in the Institute by other provisions of this section, the Director, in carrying out the functions of the Institute, is authorized to—

(1) prescribe such regulations as he deems necessary governing the manner in which its functions shall be carried out;

(2) receive money and other property donated, bequeathed, or devised, without condition or restriction other than that it be used for the purposes of the Institute and to use, sell, or otherwise dispose of such property for the purpose of carrying out its functions;

(3) receive (and use, sell, or otherwise dispose of, in accordance with paragraph (2)), money and other property donated, bequeathed, or devised to the Institute with a condition or restriction, including a condition that the Institute use other funds of the Institute for the purposes of the gift;

(4) in accordance with the civil service laws, appoint and fix the compensation of such personnel as may be necessary to carry out the provisions of this section;

(5) obtain the services of experts and consultants in accordance with the provisions of section 3109 of title 5, United States Code; 80 Stat. 416.

(6) accept and utilize the services of voluntary and noncompensated personnel and reimburse them for travel expenses, including per diem, as authorized by section 5703 of title 5, United States Code; 83 Stat. 190.

(7) enter into contracts, grants or other arrangements, or modifications thereof to carry out the provisions of this section, and such contracts or modifications thereof may be entered into without performance or other bonds, and without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5), or any other provision of law relating to competitive bidding;

(8) make advance, progress, and other payments which the Director deems necessary under this title without regard to the provisions of section 3648 of the Revised Statutes, as amended (31 U.S.C. 529); and

(9) make other necessary expenditures.

Annual report to HEW, President, and Congress.

(f) The Director shall submit to the Secretary of Health, Education, and Welfare, to the President, and to the Congress an annual report of the operations of the Institute under this Act, which shall include a detailed statement of all private and public funds received and expended by it, and such recommendations as he deems appropriate.

GRANTS TO THE STATES

SEC. 23. (a) The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States which have designated a State agency under section 18 to assist them—

(1) in identifying their needs and responsibilities in the area of occupational safety and health,

(2) in developing State plans under section 18, or

(3) in developing plans for—

(A) establishing systems for the collection of information concerning the nature and frequency of occupational injuries and diseases;

(B) increasing the expertise and enforcement capabilities of their personnel engaged in occupational safety and health programs; or

(C) otherwise improving the administration and enforcement of State occupational safety and health laws, including standards thereunder, consistent with the objectives of this Act.

(b) The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States for experimental and demonstration projects consistent with the objectives set forth in subsection (a) of this section.

(c) The Governor of the State shall designate the appropriate State agency for receipt of any grant made by the Secretary under this section.

(d) Any State agency designated by the Governor of the State desiring a grant under this section shall submit an application therefor to the Secretary.

(e) The Secretary shall review the application, and shall, after consultation with the Secretary of Health, Education, and Welfare, approve or reject such application.

(f) The Federal share for each State grant under subsection (a) or (b) of this section may not exceed 90 per centum of the total cost of the application. In the event the Federal share for all States under either such subsection is not the same, the differences among the States shall be established on the basis of objective criteria.

(g) The Secretary is authorized to make grants to the States to assist them in administering and enforcing programs for occupational safety and health contained in State plans approved by the Secretary pursuant to section 18 of this Act. The Federal share for each State grant under this subsection may not exceed 50 per centum of the total cost to the State of such a program. The last sentence of subsection (f) shall be applicable in determining the Federal share under this subsection.

(h) Prior to June 30, 1973, the Secretary shall, after consultation with the Secretary of Health, Education, and Welfare, transmit a report to the President and to the Congress, describing the experience under the grant programs authorized by this section and making any recommendations he may deem appropriate. Report to President and Congress.

STATISTICS

SEC. 24. (a) In order to further the purposes of this Act, the Secretary, in consultation with the Secretary of Health, Education, and Welfare, shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics. Such program may cover all employments whether or not subject to any other provisions of this Act but shall not cover employments excluded by section 4 of the Act. The Secretary shall compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(b) To carry out his duties under subsection (a) of this section, the Secretary may—

(1) promote, encourage, or directly engage in programs of studies, information and communication concerning occupational safety and health statistics;

(2) make grants to States or political subdivisions thereof in order to assist them in developing and administering programs dealing with occupational safety and health statistics; and

(3) arrange, through grants or contracts, for the conduct of such research and investigations as give promise of furthering the objectives of this section.

(c) The Federal share for each grant under subsection (b) of this section may be up to 50 per centum of the State's total cost.

(d) The Secretary may, with the consent of any State or political subdivision thereof, accept and use the services, facilities, and employees of the agencies of such State or political subdivision, with or without reimbursement, in order to assist him in carrying out his functions under this section.

Reports.

(e) On the basis of the records made and kept pursuant to section 8(c) of this Act, employers shall file such reports with the Secretary as he shall prescribe by regulation, as necessary to carry out his functions under this Act.

(f) Agreements between the Department of Labor and States pertaining to the collection of occupational safety and health statistics already in effect on the effective date of this Act shall remain in effect until superseded by grants or contracts made under this Act.

AUDITS

SEC. 25. (a) Each recipient of a grant under this Act shall keep such records as the Secretary or the Secretary of Health, Education, and Welfare shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such grant, the total cost of the project or undertaking in connection with which such grant is made or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(b) The Secretary or the Secretary of Health, Education, and Welfare, and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients of any grant under this Act that are pertinent to any such grant.

ANNUAL REPORT

SEC. 26. Within one hundred and twenty days following the convening of each regular session of each Congress, the Secretary and the Secretary of Health, Education, and Welfare shall each prepare and submit to the President for transmittal to the Congress a report upon the subject matter of this Act, the progress toward achievement of the purpose of this Act, the needs and requirements in the field of occupational safety and health, and any other relevant information. Such reports shall include information regarding occupational safety and health standards, and criteria for such standards, developed during the preceding year; evaluation of standards and criteria previously developed under this Act, defining areas of emphasis for new criteria and standards; an evaluation of the degree of observance of applicable occupational safety and health standards, and a summary

of inspection and enforcement activity undertaken; analysis and evaluation of research activities for which results have been obtained under governmental and nongovernmental sponsorship; an analysis of major occupational diseases; evaluation of available control and measurement technology for hazards for which standards or criteria have been developed during the preceding year; description of cooperative efforts undertaken between Government agencies and other interested parties in the implementation of this Act during the preceding year; a progress report on the development of an adequate supply of trained manpower in the field of occupational safety and health, including estimates of future needs and the efforts being made by Government and others to meet those needs; listing of all toxic substances in industrial usage for which labeling requirements, criteria, or standards have not yet been established; and such recommendations for additional legislation as are deemed necessary to protect the safety and health of the worker and improve the administration of this Act.

NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS

SEC. 27. (a)(1) The Congress hereby finds and declares that—

(A) the vast majority of American workers, and their families, are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation; and

(B) in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living.

(2) The purpose of this section is to authorize an effective study and objective evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation for injury or death arising out of or in the course of employment.

(b) There is hereby established a National Commission on State Workmen's Compensation Laws. Establishment.

(c)(1) The Workmen's Compensation Commission shall be composed of fifteen members to be appointed by the President from among members of State workmen's compensation boards, representatives of insurance carriers, business, labor, members of the medical profession having experience in industrial medicine or in workmen's compensation cases, educators having special expertise in the field of workmen's compensation, and representatives of the general public. The Secretary, the Secretary of Commerce, and the Secretary of Health, Education, and Welfare shall be ex officio members of the Workmen's Compensation Commission: Membership.

(2) Any vacancy in the Workmen's Compensation Commission shall not affect its powers.

(3) The President shall designate one of the members to serve as Chairman and one to serve as Vice Chairman of the Workmen's Compensation Commission.

Quorum. (4) Eight members of the Workmen's Compensation Commission shall constitute a quorum.

Study. (d)(1) The Workmen's Compensation Commission shall undertake a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation. Such study and evaluation shall include, without being limited to, the following subjects: (A) the amount and duration of permanent and temporary disability benefits and the criteria for determining the maximum limitations thereon, (B) the amount and duration of medical benefits and provisions insuring adequate medical care and free choice of physician, (C) the extent of coverage of workers, including exemptions based on numbers or type of employment, (D) standards for determining which injuries or diseases should be deemed compensable, (E) rehabilitation, (F) coverage under second or subsequent injury funds, (G) time limits on filing claims, (H) waiting periods, (I) compulsory or elective coverage, (J) administration, (K) legal expenses, (L) the feasibility and desirability of a uniform system of reporting information concerning job-related injuries and diseases and the operation of workmen's compensation laws, (M) the resolution of conflict of laws, extraterritoriality and similar problems arising from claims with multistate aspects, (N) the extent to which private insurance carriers are excluded from supplying workmen's compensation coverage and the desirability of such exclusionary practices, to the extent they are found to exist, (O) the relationship between workmen's compensation on the one hand, and old-age, disability, and survivors insurance and other types of insurance, public or private, on the other hand, (P) methods of implementing the recommendations of the Commission.

Report to President and Congress. (2) The Workmen's Compensation Commission shall transmit to the President and to the Congress not later than July 31, 1972, a final report containing a detailed statement of the findings and conclusions of the Commission, together with such recommendations as it deems advisable.

Hearings. (e)(1) The Workmen's Compensation Commission or, on the authorization of the Workmen's Compensation Commission, any subcommittee or members thereof, may, for the purpose of carrying out the provisions of this title, hold such hearings, take such testimony, and sit and act at such times and places as the Workmen's Compensation Commission deems advisable. Any member authorized by the Workmen's Compensation Commission may administer oaths or affirmations to witnesses appearing before the Workmen's Compensation Commission or any subcommittee or members thereof.

(2) Each department, agency, and instrumentality of the executive branch of the Government, including independent agencies, is authorized and directed to furnish to the Workmen's Compensation Commission, upon request made by the Chairman or Vice Chairman, such information as the Workmen's Compensation Commission deems necessary to carry out its functions under this section.

(f) Subject to such rules and regulations as may be adopted by the Workmen's Compensation Commission, the Chairman shall have the power to—

(1) appoint and fix the compensation of an executive director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule

80 Stat. 378. 5 USC 101.

5 USC 5101, 5331.

pay rates, but at rates not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title, and

(2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code.

(g) The Workmen's Compensation Commission is authorized to enter into contracts with Federal or State agencies, private firms, institutions, and individuals for the conduct of research or surveys, the preparation of reports, and other activities necessary to the discharge of its duties.

(h) Members of the Workmen's Compensation Commission shall receive compensation for each day they are engaged in the performance of their duties as members of the Workmen's Compensation Commission at the daily rate prescribed for GS–18 under section 5332 of title 5, United States Code, and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties as members of the Workmen's Compensation Commission.

(i) There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

(j) On the ninetieth day after the date of submission of its final report to the President, the Workmen's Compensation Commission shall cease to exist.

Ante, p. 198-1.

80 Stat. 416.
Contract authorization.

Compensation; travel expenses.

Appropriation.

Termination.

ECONOMIC ASSISTANCE TO SMALL BUSINESSES

SEC. 28. (a) Section 7(b) of the Small Business Act, as amended, is amended—

(1) by striking out the period at the end of "paragraph (5)" and inserting in lieu thereof "; and"; and

(2) by adding after paragraph (5) a new paragraph as follows:

"(6) to make such loans (either directly or in cooperation with banks or other lending institutions through agreements to participate on an immediate or deferred basis) as the Administration may determine to be necessary or appropriate to assist any small business concern in effecting additions to or alterations in the equipment, facilities, or methods of operation of such business in order to comply with the applicable standards promulgated pursuant to section 6 of the Occupational Safety and Health Act of 1970 or standards adopted by a State pursuant to a plan approved under section 18 of the Occupational Safety and Health Act of 1970, if the Administration determines that such concern is likely to suffer substantial economic injury without assistance under this paragraph."

(b) The third sentence of section 7(b) of the Small Business Act, as amended, is amended by striking out "or (5)" after "paragraph (3)" and inserting a comma followed by "(5) or (6)".

(c) Section 4(c)(1) of the Small Business Act, as amended, is amended by inserting "7(b)(6)," after "7(b)(5),".

(d) Loans may also be made or guaranteed for the purposes set forth in section 7(b)(6) of the Small Business Act, as amended, pursuant to the provisions of section 202 of the Public Works and Economic Development Act of 1965, as amended.

72 Stat. 387; 83 Stat. 602. 15 USC 636.

80 Stat. 132. 15 USC 633.

79 Stat. 556. 42 USC 3142.

ADDITIONAL ASSISTANT SECRETARY OF LABOR

SEC. 29. (a) Section 2 of the Act of April 17, 1946 (60 Stat. 91) as amended (29 U.S.C. 553) is amended by—

75 Stat. 338.

(1) striking out "four" in the first sentence of such section and inserting in lieu thereof "five"; and

(2) adding at the end thereof the following new sentence, "One of such Assistant Secretaries shall be an Assistant Secretary of Labor for Occupational Safety and Health.".

80 Stat. 462. (b) Paragraph (20) of section 5315 of title 5, United States Code, is amended by striking out "(4)" and inserting in lieu thereof "(5)".

ADDITIONAL POSITIONS

SEC. 30. Section 5108(c) of title 5, United States Code, is amended by—

(1) striking out the word "and" at the end of paragraph (8);

(2) striking out the period at the end of paragraph (9) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding immediately after paragraph (9) the following new paragraph:

"(10)(A) the Secretary of Labor, subject to the standards and procedures prescribed by this chapter, may place an additional twenty-five positions in the Department of Labor in GS–16, 17, and 18 for the purposes of carrying out his responsibilities under the Occupational Safety and Health Act of 1970;

"(B) the Occupational Safety and Health Review Commission, subject to the standards and procedures prescribed by this chapter, may place ten positions in GS–16, 17, and 18 in carrying out its functions under the Occupational Safety and Health Act of 1970."

EMERGENCY LOCATOR BEACONS

72 Stat. 775. 49 USC 1421. SEC. 31. Section 601 of the Federal Aviation Act of 1958 is amended by inserting at the end thereof a new subsection as follows:

"EMERGENCY LOCATOR BEACONS

"(d)(1) Except with respect to aircraft described in paragraph (2) of this subsection, minimum standards pursuant to this section shall include a requirement that emergency locator beacons shall be installed—

"(A) on any fixed-wing, powered aircraft for use in air commerce the manufacture of which is completed, or which is imported into the United States, after one year following the date of enactment of this subsection; and

"(B) on any fixed-wing, powered aircraft used in air commerce after three years following such date.

"(2) The provisions of this subsection shall not apply to jet-powered aircraft; aircraft used in air transportation (other than air taxis and charter aircraft); military aircraft; aircraft used solely for training purposes not involving flights more than twenty miles from its base; and aircraft used for the aerial application of chemicals."

SEPARABILITY

SEC. 32. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

APPROPRIATIONS

SEC. 33. There are authorized to be appropriated to carry out this Act for each fiscal year such sums as the Congress shall deem necessary.

EFFECTIVE DATE

SEC. 34. This Act shall take effect one hundred and twenty days after the date of its enactment.

Approved December 29, 1970.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 91-1291 accompanying H.R. 16785 (Comm. on Education and Labor) and No. 91-1765 (Comm. of Conference).
SENATE REPORT No. 91-1282 (Comm. on Labor and Public Welfare).
CONGRESSIONAL RECORD, Vol. 116 (1970):
Oct. 13, Nov. 16, 17, considered and passed Senate.
Nov. 23, 24, considered and passed House, amended, in lieu of H.R. 16785.
Dec. 16, Senate agreed to conference report.
Dec. 17, House agreed to conference report.

APPENDIX F

U.S. CONST. art. III, §1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, §2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .

. . .

. . .the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI:

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

No. 75-748

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK IREY, JR., INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
REX E. LEE,
Assistant Attorney General,
RONALD R. GLANCZ,
MICHAEL H. STEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor of Labor,
BENJAMIN W. MINTZ,
Associate Solicitor for Occupational Safety and Health,
MICHAEL H. LEVIN,
Counsel for Appellate Litigation,
JUDITH A. BURGHARDT,
Attorney,
Department of Labor,
Washington, D.C. 20210.

INDEX

CITATIONS

Cases:

201-039—76——1

Cases—Continued

Constitution, statutes and regulations—Continued

United States Constitution—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-748

FRANK IREY, JR., INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. A) is reported at 519 F. 2d 1215. The panel opinion of the court of appeals (Pet. App. B) is reported at 519 F. 2d 1200. The opinion of the Occupational Safety and Health Review Commission (Pet. App. C) is reported at 4 OSAHRC 1. The opinion and order of the Administrative Law Judge (Pet. App. D) are reported at 4 OSAHRC 8.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1975 (Pet. App. 24a–25a). On October 14, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to November 21, 1975, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the monetary "civil penalties" that may be administratively assessed under Section 17 of the Occupational Safety and Health Act of 1970, 84 Stat. 1606, 29 U.S.C. 666, are criminal fines, and thus violate the Sixth Amendment to the Constitution by failing to accord an employer the right to a trial by jury prior to imposition.

2. Whether, if such penalties are civil, the Occupational Safety and Health Act of 1970 violates the Seventh Amendment to the Constitution by providing administrative fact-finding of violations with judicial review on a substantial evidence basis in the court of appeals, rather than a trial by jury in the district court.

STATEMENT

1. THE STATUTORY SCHEME

The Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions * * *." 29 U.S.C. 651. See generally *Brennan* v.

Butler Lime and Cement Co., 520 F. 2d 1011 (C.A. 7); *Brennan* v. *Occupational Safety and Health Commission*, 513 F. 2d 553 (C.A. 10); *National Realty and Construction Co.* v. *Occupational Safety and Health Review Commission*, 489 F. 2d 1257, 1260–1261 (C.A.D.C.). The Act is administered by the Department of Labor, whose inspectors are authorized to conduct safety and health inspections, at reasonable times and in a reasonable manner, at places of employment. 29 U.S.C. 657(a). If upon inspection or investigation the Secretary has cause to believe that the Act or its implementing regulations have been violated, he is empowered to issue a citation to the employer specifically describing the violation, fixing a reasonable time for its abatement, and (in his discretion) proposing a penalty. 29 U.S.C. 658, 659.

The amount of the proposed penalty is dependent upon the severity of the hazard and the employer's diligence in attempting to correct it. 29 U.S.C. 659(a), 666(i) and (j). These assessments are expressly denominated as "civil" and may range from zero for *de minimis* or nonserious violations, to not more than $1,000 for serious violations, to a maximum of $10,000 for willful or repeated violations. 29 U.S.C. 658(a), 659(a), 666(a)–(c) and (j). The Secretary may also propose a civil penalty of not more than $1,000 per day of nonabatement where subsequent inspection reveals noncompliance with a final order, 29 U.S.C. 659(b), 666(d), and may seek injunctions to correct dangers that are likely to cause death or serious injuries before utilization of the Act's normal

enforcement procedures would result in their abatement. 29 U.S.C. 662. Finally, in cases of willful violations that cause employee death, the Secretary is authorized to refer the matter for criminal prosecution, which may result in a maximum sentence of six months' imprisonment and a $10,000 fine. 29 U.S.C. 666(e).

If an employer wishes to contest the citation or the proposed penalty, he must notify the Secretary within 15 working days; in the absence of such notice, the citation and assessment, as proposed, become final. 29 U.S.C. 659(a). Upon the filing of an employer contest, an evidentiary hearing is held before an administrative law judge of the Occupational Safety and Health Review Commission, an adjudicatory agency independent of the Secretary. 29 U.S.C. 659 (c), 661. At this hearing, conducted pursuant to the Administrative Procedure Act, 5 U.S.C. 554, the burden is on the Secretary to prove the elements of the alleged violation, and the judge is empowered to affirm, modify, or vacate the citation, abatement requirement, or proposed penalty, giving due consideration to "the size of the business of the employer * * *, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. 666(i). The judge's decision becomes the Commission's final order unless within thirty days a Commissioner directs that it be reviewed. 29 U.S.C. 659(c), 661(i).

If review is granted, the Commission's order becomes final unless the employer timely petitions for

judicial review in the appropriate court of appeals.[1] 29 U.S.C. 660. The Secretary similarly may seek review of Commission orders, 29 U.S.C. 660(b), but in either case "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. 660(a). If the cited employer fails to contest a citation or to petition for review, the Secretary is empowered to ensure abatement by seeking a summary judicial decree, enforceable by contempt, in the court of appeals. 29 U.S.C. 660(b).

2. THE FACTS

Petitioner Frank Irey, Jr., Inc. is a large construction contractor which in 1971 and 1972 was engaged in digging trenches in Morgantown, West Virginia, under a contract that expressly required it to comply with trenching safety standards of the Act and that incorporated soil tests clearly indicating that most worksite soil was unstable (Pet. App. 2b–3b, 3d–5d, 7d–8d, 10d–11d). In November 1971 a state safety inspector observed petitioner's employees working in a deep trench whose soft sides were thoroughly wet, cited petitioner both orally and in writing for failing to protect against such "extremely dangerous" conditions, and informed petitioner's job

[1] The period for abatement of the violation runs from the date that the Commission's order becomes final, and a petition for judicial review does not suspend the abatement requirement unless a stay is granted by either the Commission or the court of appeals. 29 U.S.C. 660(a); 29 C.F.R. 2200.92.

superintendent that the trench had been dug in hazardous material rather than in safe rock-like shale (Pet. App. 3b, 3d–4d, 8d, 10d). On January 11, 1972, petitioner's employees were working in another deep trench near the previous one, under the direction of the same job superintendent, when a side made of soft wet material collapsed, killing one worker (Pet. App. 2b–3b, 5d–9d, 10d–11d).

As a result of this fatality, a federal inspector visited the worksite and cited petitioner for a willful violation of the Act's trenching safety standards and six other violations.[2] The Secretary proposed a $7,500 civil penalty for the violation and ordered the violation abated immediately (Pet. App. 2b, 4b, 1d–2d). Petitioner timely contested all seven violations and abatement requirements, contending primarily that its superintendent had been under the good faith although mistaken belief that the wall of the trench was shale (Pet. App. 3b–4b, 2d, 6d–7d, 10d–11d).

The Administrative Law Judge and Commission rejected petitioner's defense, finding *inter alia* that petitioner "was thoroughly familiar with the requirements of the Act and the [trenching] Standards"; that a willful violation exists where either deliberate violative conduct is established or the employer "was aware that a hazardous condition existed and made no

---

[2] See 29 C.F.R. 1926.652(b) and Table P–1, requiring the sides of trenches in "unstable or soft material" to be "shored, * * * sloped, or otherwise supported by means of sufficient strength to protect the employees working within them" and warning that "Non-Homogenous Soils" and "The Presence of Ground Water" create special dangers.

reasonable effort to eliminate [it]"; and that such a violation was present here because petitioner "either had actual knowledge that the material * * * it was excavating was unstable or had knowledge of facts indicating that it had not accurately informed itself of the nature of the soil," although with "the exercise of only slight * * * diligence" it could have discovered the hazard (Pet. App. 1c, 5d, 7d–8d, 12d, 14d, 15d–16d). However, the judge and Commission reduced the proposed penalty for this violation to $5,000, and vacated or significantly reduced several of the other proposed penalties (Pet. App. 1c, 12d, 15d–21d).

Petitioner thereupon sought judicial review in the United States Court of Appeals for the Third Circuit, challenging both the finding of a willful violation and the constitutionality of the Act's enforcement procedures.

3. THE COURT OF APPEALS' DECISION

On review, the court of appeals rejected petitioner's contentions that the Act conflicted with the Sixth and Seventh Amendment, but reversed the administrative finding that petitioner's safety violation was willful and remanded the case to the Commission for further proceedings.[3] The panel unanimously dis-

[3] The court also upheld the Act's provision requiring the employer to initiate a notice of contest, holding that the minimal burden on the employer is little different from that imposed on a party who must answer a complaint within a given time or be subject to a default judgment and that the employer is accorded the opportunity for a hearing before the Secretary's proposed penalty becomes final (Pet. App. 9b). See *National Independent*

(Continued)

missed the contention that the civil penalties authorized by the Act were in reality criminal fines which would necessitate a jury trial under Article III of the Constitution and the Sixth Amendment. The court relied upon "a series of Supreme Court decisions which have validated the position that Congress has a wide range of alternatives available to it for enforcing its legislative policy through administrative agencies" (Pet. App. 7b) and held that congressional intent to create a civil, rather than a criminal, sanction in Section 17 of the Act was clear.

The court also rejected, with one dissent, the claim that the Act's administrative enforcement scheme conflicted with the civil jury trial requirement of the Seventh Amendment, again noting that this Court had upheld legislative decisions to "commit [the] collection [of a penalty] to an administrative office without the necessity of resorting to the judicial power," and that the congressional determination to proceed in such a manner was within its discretion (Pet. App. 8b–9b, n. 11).

On rehearing *en banc* the court again upheld the constitutionality of the civil penalty provisions. The court, which discussed only the Seventh Amendment issue, concluded (with four judges dissenting) upon review of a line of decisions of this Court, that en-

---

(Continued)

Coal Operator's Association v. *Kleppe*, No. 73–2066, decided January 26, 1976; *Yakus* v. *United States*, 321 U.S. 414; *McLean Trucking Co.* v. *Occupational Safety and Health Review Commission*, 503 F. 2d 8, 11 (C.A. 4).

forcement actions under the Act were "administrative adjudications," that "[t]he Supreme Court's rulings to date leave no doubt that the Seventh Amendment is not applicable, at least in the context of a case such as this one, and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage" (Pet. App. 8a).

ARGUMENT

1. The holding of the court of appeals that the penalty provisions of the Occupational Safety and Health Act are civil rather than criminal, and are thus not subject to the Sixth Amendment's jury trial requirement, is in accord with the decisions of the four other courts of appeals that have considered this issue. See, *e.g.*, *Clarkson Construction Co.* v. *Occupational Safety and Health Review Commission*, C.A. 10, No. 75–1070, decided January 21, 1976; *Brennan* v. *Winters Battery Manufacturing Co.*, C.A. 6, No. 75–1367, decided December 18, 1975; *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 518 F. 2d 990 (C.A. 5), pending on petition for a writ of certiorari, No. 75–746; *Beall Construction Co.* v. *Occupational Safety and Health Review Commission*, 507 F. 2d 1041 (C.A. 8); *American Smelting and Refining Co.* v. *Occupational Safety and Health Review Commission*, 501 F. 2d 504 (C.A. 8). Cf. *Underhill Construction Corp.* v. *Secretary of Labor*, C.A. 2, No. 75–4058, decided November 24, 1975, slip op. 658, n. 10. This holding is correct and is consistent with numerous deci-

sions of this Court. There accordingly is no occasion for further review.

The uniform dismissal by the lower courts of petitioner's Sixth Amendment claim is not surprising in view of this Court's repeated rejection of similar contentions. See *Helvering* v. *Mitchell,* 303 U.S. 391; *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U.S. 320; *Hepner* v. *United States,* 213 U.S. 103. These and other cases have resulted in settled law that the status of monetary sanctions is a matter of statutory construction and congressional intent, that the deterrent nature of financial assessments does not render them criminal, and that both criminal and civil sanctions can attach to the same act or omission. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663; *One Lot Emerald Cut Stones* v. *United States,* 409 U.S. 232; *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144; *Chicago, Burlington and Quincy Railway Co.* v. *United States,* 220 U.S. 559.

Here, the Act expressly denominates the penalties imposed by 29 U.S.C. 666(a)–(d) as civil, and "[w]hen Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word." *United States* v. *J. B. Williams Co., Inc.,* 498 F. 2d 414, 421 (C.A. 2). Moreover, even apart from the unambiguous indication of congressional intent, the Act's penalty provisions are civil when analyzed in light of the factors outlined in *Kennedy* v. *Mendoza-Martinez, supra,* 372 U.S. at 168–170. As the Fifth Circuit recently con-

cluded in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission, supra,* 518 F. 2d at 1000–1011: (1) the Act's civil penalties are not disabilities although they do carry a "pocket-book deterrence"; (2) monetary penalties have long served a remedial rather than a punitive function; (3) most violations of the Act do not require a showing of scienter, and civil money assessments are the sole enforcement measures authorized for non-willful violations;[4] (4) Congress could rationally have concluded that civil sanctions would serve the remedial function of "saving * * * life and limb"; and (5) the Act's penalties are not excessive, especially in view of "[t]he remedial functions obviously served" by "improved industrial practices that help to prevent future deaths."

Finally, this Court recently emphasized the legitimacy of civil penalties as an appropriate incentive

---

[4] Although the Act provides that "willful" violations of regulations that cause death may be proceeded against either civilly or criminally, the court of appeals vacated the Commission's finding that petitioner had committed a "willful" violation. Thus, petitioner's contention (Pet. 17–20, 21) that it in effect was prosecuted criminally without Fifth and Sixth Amendment safeguards, while erroneous in view of the above discussion, also is not squarely presented by this case. In any event, petitioner's reliance (Pet. 21, n. 12) upon a statement by Senator Williams to demonstrate that Congress intended the Act's willfulness penalties to be solely criminal is misplaced. The Senator's comments referred to provisions of a Senate bill, containing express criminal penalties for *all* willful violations, that did not survive in conference. See Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong., 1st Sess. 265–266, 435, 565–566, 1170–1172, 1194 (1970).

to voluntary compliance[5] with the scheme of a regulatory statute in its discussion of the analogous "civil penalty" provisions of Section 109 of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 756, 30 U.S.C. 819:

> The importance of § 109 in the enforcement of the Act cannot be overstated. Section 109 provides a strong incentive for compliance with the mandatory health and safety standards. That the violations of the Act have been abated or miners withdrawn from the dangerous area before § 109 comes into effect is not dispositive; if a mine operator does not also face a monetary penalty for violations, there is little incentive to eliminate dangers until directed to do so by a mine inspector. The inspections may be as infrequent as four a year. A major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.

National Independent Coal Operator's Association v. *Kleppe*, No. 73–2066, decided January 26, 1976, slip op. 12–13.

2. Petitioner's Seventh Amendment challenge similarly does not warrant further review. This contention also has been rejected without exception by the courts of appeals. *Clarkson Construction Co.* v. *Occupational Safety and Health Review Commission, supra; Brennan* v. *Winters Battery Manufacturing Co., supra; Lake Butler Apparel Co.* v. *Secretary of*

---

[5] The central focus of the Act is to ensure compliance before as well as after a federal inspector arrives. See, *e.g.*, *Brennan* v. *Occupational Safety and Health Commission, supra; REA Express,*

Labor, 519 F. 2d 84, 88–89 (C.A. 5); *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission, supra; Beall Construction Co.* v. *Occupational Safety and Health Review Commission, supra.* Those decisions rely upon the repeated pronouncements of this Court that Congress may entrust enforcement of a statute, including the imposition of monetary penalties or their equivalent as an incident to effective regulation, to an administrative tribunal. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1; *Pernell* v. *Southall Realty* 416 U.S. 363; *Curtis* v. *Loether,* 415 U.S. 189; *Block* v. *Hirsh,* 256 U.S. 135.[8]

In *Curtis* v. *Loether, supra,* 415 U.S. at 194, for example, in ruling that either party to an action to recover damages for violation of the housing discrimination provisions of Title VIII of the Civil Rights Act of 1968 has a right to a jury trial, the Court noted that "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication * * *." Similarly, in *Pernell* v. *Southall Realty, supra,* 416 U.S. at 383, the Court, although holding that a landlord was entitled to a trial by jury in a suit to recover real property,

---

Inc. v. *Brennan,* 495 F.2d 822 (C.A. 2); Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong., 1st Sess. 297–300 (Sen. Saxbe), 471–472 (Sen. Dominick), 853, 856 (House Report) (1970).

[8] *Accord: Katchen* v. *Landy,* 382 U.S. 323; *Lloyd Sabaudo Societa* v. *Elting,* 287 U.S. 329; *Oceanic Steam Navigation Co.* v. *Stranahan, supra; Passavant* v. *United States,* 148 U.S. 214; *Bartlett* v. *Kane,* 16 How. 263.

"assume[d] that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right of possession, to an administrative agency." These cases merely restate the settled rule that the legislature may abolish a common law remedy and substitute an analogous administrative remedy with no resort to a jury.[7]

A fortiori, Congress may create rights and obligations unknown at common law and establish an expert administrative tribunal to enforce those rights. This is especially so where, as here, the congressional purpose was the swift securing of administrative abatement orders, which are equitable and to which assessed penalties, "if any," 29 U.S.C. 659(a), are ancillary. Both the legislative history and the language of the Act emphasize that Congress was primarily concerned with the elimination of dangers to "life and limb"; the highly discretionary monetary assessment power given to the Secretary merely was but one tool to ensure that such hazards would indeed be removed without delay. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra,* 301 U.S. at 48–49; *National Independent Coal Operator's Association* v. *Kleppe, supra.*

3. Finally, contrary to petitioner's pervasive assertions (Pet. 6–8, 22–23), the provisions of the Act au-

[7] See, *e.g.*, *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (workmen's compensation claims); *Block* v. *Hirsh* 256 U.S. 135 (landlord-tenant claims).

thorizing administrative imposition of civil penalties without a jury trial *de novo* do not constitute a radical departure from prior legislation. There presently are several federal statutes permitting an administrative agency to assess such civil penalties [8] and the concept itself has been recognized in federal administrative practice for at least 80 years. *Allman* v. *United States*, 131 U.S. 31, 35; *Oceanic Steam Navigation Co.* v. *Stranahan, supra.*

In sum, petitioner's constitutional claims have been persuasively rejected by every court to hear them and are at odds with controlling decisions of this Court. There is no necessity for further review of the correct decision of the court of appeals.

---

[8] See, *e.g.*, 39 U.S.C. 5206, 5603 (Postal Service); 8 U.S.C. 1221(d), 1223(c), 1227(b), 1229, 1253(e), 1281(d), 1284(a), 1285–1287, 1321, 1322(a), 1322(b), 1323(a), 1323(b) (Immigration and Naturalization Service); 12 U.S.C. 1425a(d), 1425b (Federal Home Loan Bank Board); 49 U.S.C. 1678 (Natural Gas Pipeline Safety Act); 30 U.S.C. 819 (Federal Coal Mine Health and Safety Act).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
REX E. LEE,
Assistant Attorney General.
RONALD R. LANCZ,
MICHAEL H. STEIN,
Attorneys.

WILLIAM J. KILBERG,
Solicitor of Labor,
BENJAMIN W. MINTZ,
Associate Solicitor for
Occupational Safety and Health,
MICHAEL H. LEVIN,
Counsel for Appellate Litigation,
JUDITH A. BURGHARDT,
Attorney,
Department of Labor.

FEBRUARY 1976.

U.S. GOVERNMENT PRINTING OFFICE: 1976